92-1933

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PATUXENT INSTITUTION BOARD OF REVIEW,
Petitioner,

v.

CLARENCE J. HANCOCK,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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Attorney General of Maryland

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

Without making any finding that Maryland's parole statute and regulations established a liberty interest in parole, the Court of Appeals of Maryland held that a prisoner's parole had been revoked without constitutionally adequate notice. This case presents the following questions:

1. Is the decision of the Court of Appeals, holding that a parole board's order of parole created a liberty interest that could not be revoked without complying with due process requirements, in conflict with Jago v. Van Curen, 454 U.S. 14 (1981)?

2. If the board's order did create a liberty interest, did the Court of Appeals hold correctly that the parole of an individual who presents a threat to public safety was revoked unconstitutionally because he had not

received written notice that his failure to comply with the instructions and directives of his therapist could result in the loss of his conditional liberty?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding below were the Patuxent Institution Board of Review, petitioner in the court below; and Clarence J. Hancock, respondent below.

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No. 92-____

October Term, 1992

IN THE
SUPREME COURT OF THE UNITED STATES

PATUXENT INSTITUTION BOARD OF REVIEW,

Petitioner,

v.

CLARENCE J. HANCOCK,

Respondent.

On Petition for Writ of Certiorari to the
Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

The Patuxent Institution Board of Review, an agency of the State of Maryland ("Patuxent" or "State"), respectfully petitions this Court for a writ of certiorari

to review the judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The March 12, 1993 opinion of the Court of Appeals is reported at 329 Md. 556, 620 A.2d 917, and is reprinted at pages 3a-96a of the appendix ("App.") to this petition. The opinion of the Court of Special Appeals of Maryland is unreported and reprinted App. at 97a-112a. The order of the Circuit Court for Howard County is unreported and reprinted App. at 113a-115a. The decision of the Patuxent Institution Board of Review revoking respondent's parole is unreported and reprinted App. at 116a-121a. The order of parole issued to respondent is unreported and reprinted App. at 122a-128a. The memorandum and order of the Circuit Court for Baltimore City is unreported and reprinted App. at

129a-134a.

This Court's April 14, 1993 order denying petitioner's application for a stay of the Court of Appeals' mandate is unreported and reprinted App. at 1a. The Court of Appeals' April 1, 1993 order denying petitioner's motion for reconsideration and the stay of its mandate is unreported and reprinted App. at 2a.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on March 12, 1993. This petition was filed within 90 days of that judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV, SECTION 1:

> * * * No State shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Clarence Hancock was sentenced to life imprisonment plus thirty five years following his conviction for murder, attempted murder and assault and battery. (App. at 4a.) For many years prior to his crime, Mr. Hancock experienced sadistic sexual fantasies of rape. After a period of obsessive thoughts about his victim, he decided to break into her house while she was out, tie up her three children and rape her when she returned. Before he could finish with the

children, the victim returned and Mr. Hancock tied and gagged her with the cord and tape he brought with him. Just after Mr. Hancock removed her clothes, the victim screamed. Mr. Hancock grabbed a hammer and beat her to death. When the eleven year old son came to help his mother, Mr. Hancock struck the child 27 or 28 times, inflicting massive and permanent brain damage. (App. at 89-90a.)

Following his incarceration, Mr. Hancock was diagnosed as suffering from sexual sadism and a schizoid personality. He was subsequently admitted to Patuxent Institution, a State agency that operates independently of the State prison system for the purpose of treating and rehabilitating certain criminals with emotional imbalance. See Md. Ann. Code Art. 31B §§ 1, 2 (1957, 1990 Repl. Vol., 1992 Cum. Supp.).

In 1987, the former Director of Patuxent recommended to the Governor that Mr. Hancock be granted parole. (App. at 80a.) The Governor rejected the recommendation. Shortly thereafter, Mr. Hancock's behavior began to deteriorate. (App. at 9a.) A 1989 independent psychological evaluation found him to be dangerous and, in 1990, Patuxent concluded that he no longer qualified as an eligible person under the Patuxent statute and transferred him back to the Division of Correction. (App. at 9a; 81a.)

Mr. Hancock filed a habeas corpus action in July 1990 based on a June 1990 decision of the Court of Appeals of Maryland holding that the gubernatorial approval requirement violated the ex post facto clause. (App. at 9a-10a.) The State court ordered Patuxent to parole Mr. Hancock unless it commenced the legally

mandated procedures to revoke parole. (App. at 11a.) Accordingly, Patuxent served Mr. Hancock with an order of parole, effective only for one year, and at the same time served him with a parole revocation warrant. (App. at 12a-15a; 116a-129a.) Thus, Patuxent exercised its right to revoke Mr. Hancock's parole prior to physically releasing him. (App. at 14a-15a; 22a; 27a.)

Following an administrative hearing at which his therapist testified that Mr. Hancock is dangerous and his parole would pose a threat to public safety because he had not resolved the problems that led to his crime, Patuxent revoked his parole due to his lack of progress in the rehabilitative programs and his ineligibility to continue at Patuxent. (App. at 15a-17a.) The Patuxent Board concluded that since November of 1989, Mr. Hancock "failed to continue seriously addressing the

motivation of his crime, which is critical to his successful rehabilitation." (App. at 16a.) Although he was cautioned on a number of occasions, Mr. Hancock failed to satisfactorily participate in therapy. (Id.) The Board concluded that Mr. Hancock's conduct "thwarted the purpose and mission of the Institution" (App. at 17a), and found that he was in violation of the terms and conditions of parole.

This decision was upheld by the State circuit court but reversed on appeal by the State's intermediate appellate court. (App. at 97a.) The Court of Appeals of Maryland granted the State's petition for writ of certiorari and issued a stay of the judgment pending its decision. On March 12, 1993, the Court of Appeals held, with three judges dissenting, that Mr. Hancock should be released because he had acquired a liberty

interest when Patuxent served him with the order of parole and that his due process rights were violated because he was not made aware that his progress in therapy was an actual condition of parole which would result in loss of liberty if violated. (App. at 3a.)

Patuxent subsequently filed with the Court of Appeals a motion for reconsideration and, in the alternative, for a stay of the issuance of the mandate. After that motion was denied on April 1, 1993 (App. 2a), Patuxent filed an emergency application with this Court for a stay of judgment of the Court of Appeals. Chief Justice Rehnquist, sitting as Circuit Justice, denied that request for a stay on April 14, 1993. (App. at 1a.)

REASONS FOR GRANTING REVIEW

This case presents the important question of whether in the absence of a statute or regulation establishing a

due process right in parole, a liberty interest in parole release can ever be created solely by the acts of State officials. This case also raises the equally significant question of whether a State may revoke parole when it concludes that release will impose an unreasonable risk on society without so stating explicitly in the written order of parole. The Court of Appeals of Maryland held that a State parole board's order of parole conferred upon a prisoner a constitutionally-protected liberty interest that could not be revoked without complying with due process. The Court of Appeals also held that due process was violated because the conduct underlying the revocation of respondent's parole was not criminal and respondent was not notified adequately in advance that his parole could be revoked. This case warrants review because Maryland's highest court has

decided these federal questions in a way that conflicts with applicable decisions of this Court, including Jago v. Van Curen, 454 U.S. 14 (1981), and the decisions of other courts, and impairs substantially the flexibility that prison officials and parole authorities must have in deciding whether to release convicted felons into the community.

This Court has held that there is no inherent constitutional entitlement to be released prior to serving a sentence of imprisonment and that a due process right to parole can be created only by a State's statutes and regulations. Indeed, in determining whether an inmate has a liberty interest entitled to due process protection, this Court has emphasized repeatedly that the language of the applicable prison statutes and regulations must be closely examined. Without exception, therefore, this

Court has based its analysis on State law in resolving whether there exists a protected interest in parole, good-time credits, transfer, or form of confinement.

In contrast with this Court's decisions, the Court of Appeals held that a liberty interest in parole can be created solely by a parole board's order authorizing respondent's release, notwithstanding that the parole board acted simultaneously to revoke that parole. No such right can be found to exist without conducting the required inquiry into the applicable parole statutes and regulations. Nor can a court properly hold that such a right exists in States such as Maryland that have endowed their officials with the unfettered discretion to revoke an inmate's eligibility for parole at any time. This Court should accordingly review this case and reverse the sweeping and unsound rule of federal

constitutional law announced by the Court of Appeals.

Assuming that the parole board's order created a constitutionally protected liberty interest in parole, review is also warranted to address the currently unresolved but important issue of what notice a State must first provide a parolee before that person's parole may be revoked. The Court of Appeals held that because the conduct that formed the basis for the parole revocation in this case was not in violation of any law and did not constitute an institutional infraction, due process required that the respondent, who was incarcerated in and paroled from a correctional institution uniquely conceived to treat individuals with serious emotional deficiencies, be specifically notified in advance that his failure to satisfactorily participate in therapy and resolve the deficiencies that motivated his

criminal conduct would result in the revocation of his parole. This Court should address whether the States are prohibited from terminating a parolee's conditional liberty unless they first explicitly apprise that person of each circumstance that could lead to his or her reincarceration.

I. THIS CASE PRESENTS THE IMPORTANT QUESTION OF WHETHER A STATE PAROLE BOARD'S ACTIONS CAN EVER CREATE A LIBERTY INTEREST IN PAROLE RELEASE.

A. The Decision Below Is In Conflict With Applicable Decisions Of This Court.

Observing that a constitutionally-protected liberty interest in parole release may be created by "a statute, administrative rules or regulations, or accepted practices," (App. at 53a) (emphasis added), the Court of Appeals held that when petitioner Patuxent Institution

Board of Review "served the respondent with an Order of Parole and a copy of a parole agreement, the petitioner effected the respondent's parole and, in the process, created in him a liberty interest in parole release." (App. at 57a-58a.) This case squarely raises the important question, therefore, about whether a prisoner's due process right to parole can be caused solely by the acts of State officials and thus whether, as the Court of Appeals held, "the Order of Parole created a liberty interest." (App. at 62a.) While this Court has never addressed this constitutional question in this specific context, the rationale of its prior decisions mandates reversal of the court below.

"Liberty interests protected by the Fourteenth Amendment may arise from two sources -- the Due Process Clause itself and the laws of the States." Hewitt

v. Helms, 459 U.S. 460, 466 (1983). With respect to parole, "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 7 (1979). Rather, this Court has looked exclusively to the States' statutes and regulations when determining the existence of liberty interests in the context of parole and other prison settings. See, e.g., Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454 (1989) (visitation privileges); Board of Pardons v. Allen, 482 U.S. 369 (1987) (parole); Olim v. Wakinekona, 461 U.S. 238 (1983) (transfer); Hewitt v. Helms, 459 U.S. 460 (form of confinement); Jago v. Van Curen, 454 U.S. 14 (1981) (parole); Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1981)

(sentence commutation); Greenholtz, 442 U.S. 1 (parole); Wolff v. McDonnell, 418 U.S. 539 (1974) (good-time credits).

Further, as this Court has explained, in determining "that certain state-created liberty interests have been found to be entitled to due process protection, while others have not, . . . our method of inquiry in these cases always has been to examine closely the language of the relevant statutes and regulations." Kentucky Dept. of Corrections, 490 U.S. at 461 (emphasis added) (footnote omitted). Conversely, this Court has never held that a prisoner has a liberty interest without finding that a State law created such an interest "by establishing 'substantive predicates' to govern official decision-making, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have

been met." Id. at 462 (citation omitted).

The language of the relevant Maryland law imposes no substantive restraints that create a liberty interest in parole. Md. Ann. Code Art. 31B, § 11(b)(1) provides that the State "[a]t any time" "may" conclude a person is no longer eligible to participate in Patuxent and thus be paroled from that institution, and that the State may instead transfer that person to "an appropriate correctional facility designated by the Commissioner." Moreover, that same statute provides that the State "may" act upon an inmate's request for parole, but only if it chooses to do so. Id. This statutory scheme suggests strongly that respondent has no due process right because "statutes or regulations that provide that a parole board 'may' release an inmate on parole do not give rise to a protected liberty interest." Board of

Pardons v. Allen, 482 U.S. at 378 n.10 (citing cases).

Because the Court of Appeals did not even address Maryland's regulatory scheme governing parole, however, nor make any finding that the State's parole statute and regulations created a due process interest, the court "abandoned the essential inquiry in determining whether" Maryland's "statute creates a liberty interest." Board of Pardons v. Allen, 482 U.S. at 385 (O'Connor, J., dissenting). In holding in the absence of such a fundamental examination that the State parole board's actions created a liberty interest in parole, the Maryland court has fashioned an unprecedented rule of constitutional law that "severely restrict[s] the necessary flexibility of prison administrators and parole authorities. . . ." Jago v. Van Curen, 454 U.S. at 19. Under that rule, "any one of their myriad decisions with

respect to individual inmates may, as under the general law of contracts, give rise to protected 'liberty' interests which could not thereafter be impaired without a constitutionally mandated hearing under the Due Process Clause." Id.

This Court's per curiam opinion in Jago v. Van Curen rejected a virtually identical lower court holding in finding that no due process violation was caused by a parole board's unilateral rescission of its decision to grant parole when Ohio law created no protected liberty interest in parole release. See 454 U.S. at 20-21. The court below distinguished Jago on the ground that "[t]he respondent in Jago had not been paroled, but merely recommended for parole," while "[t]he critical decision in the case before us was not favorably to recommend parole; rather, it was to grant it. Such a decision may

not, without complying with due process, be rescinded based on new information discovered before physical release has actually occurred." (App. at 61a.) As in Jago, however, because there is no finding that the State's parole law and regulations created a liberty interest, the actions of State officials taken in response to an inmate's request for parolee furnish the only basis "from which the liberty interest flowed." (App. at 58a.) That seems to be precisely what this Court held cannot support a constitutional right to parole.

Even if, as the Court of Appeals found, the State's conduct led respondent to believe that he had all of the rights of a parolee (see App. at 61a-62a), that would not appear to create a constitutionally-protected liberty interest. Those State actions do not establish a constitutional right because "a mere expectation of a

benefit -- even if that expectation is supported by consistent government practice -- is not sufficient to create an interest protected by procedural due process." Board of Pardons v. Allen, 482 U.S. at 382 (O'Connor, J., dissenting). "A constitutional entitlement cannot 'be created -- as if by estoppel -- merely because a wholly and expressly discretionary state privilege has been granted generously in the past.'" Connecticut Board of Pardons v. Dumschat, 452 U.S. at 465 (emphasis and citation omitted).

Moreover, because Maryland law limits the initial grant of parole to a period "not exceeding one year," Md. Ann. Code Art. 31B, § 11(b)(2), and because that year expired in August, 1991, when this case was on appeal, Mr. Hancock could no longer claim even an expectation of release. The State's actions in this case

"standing alone generate no constitutional protections; a contrary conclusion would trivialize the Constitution." Connecticut Board of Pardons v. Dumschat, 452 U.S. at 465.

Because "the Maryland parole statute does not create a legitimate expectation of parole release," Bryant v. State, 848 F.2d 492, 493 (4th Cir. 1988), and because the Court of Appeals did not even conduct such an inquiry as this Court "always" has when examining whether a State has "granted inmates a protected interest in parole," Kentucky Dept. of Corrections v. Thompson, 490 U.S. at 461, the court erroneously held that the State's actions in this case generated a liberty interest. Therefore, the holding below that the parole board's order of parole established a liberty interest is in conflict with applicable decisions of this Court. This

Court should grant review and reverse that decision. See Sup. Ct. R. 10.1(c).

B. The Decision Below Is In Conflict With Decisions Of Other Courts.

A further reason for granting review is that the Court of Appeals has decided a federal question in a way that conflicts with the decisions of several United States courts of appeals and of another state court of last resort. The court's holding that respondent had a liberty interest in parole is in conflict with the decision in Bryant v. State, 848 F.2d 492 (4th Cir. 1988), where the Fourth Circuit held that Maryland's parole statute created "no right protected by the due process clause." Id. at 493. The decision below also is in conflict with the decisions of other courts that have held that in the absence of a liberty interest created by a State's laws or

regulations, the actions of State officials by themselves are insufficient to create a liberty interest in parole. See Ingrassia v. Purkett, 985 F.2d 987, 988 (8th Cir. 1993); Inmates of Orient Correctional Institute v. Ohio State Adult Parole Authority, 929 F.2d 233, 235-238 (6th Cir. 1991); Winters v. Solem, 444 N.W.2d 722 (S.D. 1989). See also Johnson v. Pennsylvania Board of Probation and Parole, 532 A.2d 50, 52 (Pa.Cmwlth. 1987). This Court should resolve these conflicts. See Sup. Ct. R. 10.1(b).

II. THIS CASE PRESENTS THE SIGNIFICANT ISSUE OF FIRST IMPRESSION OF WHAT NOTICE IS CONSTITUTIONALLY DUE WHEN REVOKING A PRISONER'S PAROLE.

This case also presents a fundamental issue "which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1(b). That issue is, assuming the Due

Process Clause is applicable in this case, what type of notice State officials are required to provide before they may revoke an individual's parole. The Court of Appeals held that despite respondent's incarceration in and parole from a prison facility designed specially to treat individuals with serious emotional disorders, the State revoked unconstitutionally his parole on the ground that he failed to participate satisfactorily in therapy because it did not notify him in advance that "therapy was an actual condition of parole which, if violated, would result in loss of liberty." (App. at 70a.) That narrow interpretation of the Fourteenth Amendment cannot be the constitutional law of the United States.

While this Court has noted that typical parole conditions, such as that the parolee avoid "undesirable" associations, may be "quite vague," see Morrissey v.

Brewer, 408 U.S. 471, 479 (1972), it has never defined the notice that the States are required to provide parolees under the Due Process Clause before terminating their conditional liberty. The absence of guidance in this area has contributed to an assortment of inconsistent lower court decisions. See Cohen, Neil P., Gobert, James J., The Law of Probation and Parole, § 5.05, at 197 (1983; 1992 Cum. Supp.) ("Many judicial opinions establishing standards of precision for probation and parole conditions assume that due process governs the clarity with which the conditions must be expressed, but do not agree on, and often do not even discuss, the appropriate test to be used in assessing the validity of a given condition.") (footnotes omitted).

This inconsistency is particularly evident in cases addressing the constitutional validity of decisions

revoking parole or probation due to the failure to participate in therapy, with some courts, such as the court below, holding that a parolee's liberty cannot be revoked unless that individual is explicitly notified of the requirement to fully attend and participate in therapy, see also Benboe v. State, 738 P.2d 356 (Alaska App. 1987), and other courts reaching a contrary conclusion. See, e.g., State v. Vermont, 578 A.2d 104, 106 (Vt. 1990) (rejecting probationer's contention that "because his probation agreement neither explicitly nor implicitly required that he admit having had sexual intercourse with his stepdaughter, he had no fair notice that his probation could be revoked based on his refusal to make such an admission.").

The facts surrounding respondent's incarceration and parole in this case demonstrate that he was on fair notice

that his failure to fully participate in therapy could lead to the revocation of his parole. The central purpose of the penal institution where he was imprisoned and paroled from is to provide efficient and adequate programs and services for the treatment of individuals suffering from serious deficient intellectual and emotional imbalances.[1] Respondent's attendance in therapy and other weekly supervision sessions is inextricably intertwined with that mission because therapy plays an instrumental role in the institution's exercise of its statutory responsibility both to provide treatment to individuals with dangerous behavioral disorders and, concomitantly, to evaluate whether an

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[1] See Md. Ann. Code Art. 31B, § 2; Director v. Daniels, 243 Md. 16, 31, 221 A.2d 397, 410-11, cert. denied sub nom., Avey v. Boslow, 385 U.S. 940 (1966); App. at 4a-5a.

individual presents an unreasonable risk to the community and thus is statutorily eligible to receive and/or remain on parole. See Md. Ann. Code Art. 31B, §§ 11(b)(2); 11(c).

Respondent was necessarily on notice, therefore, of his obligation to fully participate in therapy. To have any expectation of early parole, Mr. Hancock was on notice that he must remain an "eligible person," which under the Patuxent statute is defined as "one likely to respond favorably to the programs and services provided at Patuxent." Md. Ann. Code Art. 31B, § 1(g). As the dissent below stated, "implicit in the grant of parole from Patuxent Institution would be the conditions that the inmate remain legally eligible for parole status, and that parole of the inmate 'will not impose an unreasonable risk on society. . . .' Maryland Code

(1957, 1990 Repl. Vol.) Art. 31B, § 11(b)(2). These are conditions 'so basic and fundamental that any reasonable person would be aware of such condition[s].'" (App. at 88a) (citation omitted).

The Court of Appeals nevertheless stated that "[b]ecause the conduct on the basis of which the revocation was premised was not criminal . . . and did not constitute an institutional infraction, . . . we hold that respondent's parole was improperly revoked, he not having been notified, in advance, of the condition allegedly violated." (App. at 68a-69a.) This Court should review this case to decide if the Court of Appeals was correct when it held that the Constitution is so rigid that in order to revoke the parole of an individual who currently presents a risk to society, prison officials must have anticipated and imposed specific parole conditions

for all conduct that manifests this dangerousness.

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland. Following review, that judgment should by reversed.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

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April 14, 1993

Ms. Carmen Shepard
Assistant Attorney General
200 St. Paul Place-20th floor
Baltimore, MD 21202

Re: Patuxent Institution Board of Review,
v. Clarence J. Hancock
Application No. A-762

Dear Ms. Shepard:

The application for stay of the mandate pending the timely filing and disposition of a petition for writ of certiorari in the above-entitled case has been presented to the Chief Justice who on April 14, 1993, endorsed thereon the following:

"4/14/93
Denied
William Rehnquist"

Very truly yours,
WILLIAM K. SUTER, Clerk

By

Cynthia Rapp
Assistant Clerk

NOTE - FOR YOUR INFORMATION: a copy of this letter has been sent to all interested parties shown on the attached notification list.

April 2, 1993

Carmen M. Shepard, Esquire
Attorney General's Office
200 St. Paul Place
Baltimore, MD 21202

RE: Patuxent Institution Board of Review
v. Clarence J. Hancock
No. 5, September Term, 1992

Dear Ms. Shepard:

Please be advised that the motion for reconsideration and the stay of the issuance of the mandate were denied by the Court on April 1, 1993.

Very truly yours,

Alexander L. Cummings
Clerk

ALC:bmd
cc: Joseph B. Tetrault, Esq.

IN THE COURT OF APPEALS OF MARYLAND

No. 5

SEPTEMBER TERM, 1992

PATUXENT INSTITUTION BOARD OF REVIEW

v.

CLARENCE J. HANCOCK

Murphy, C.J.
Eldridge
Rodowsky
McAuliffe
Chasanow
Karwacki
Bell

JJ.

OPINION BY Bell, J.
Murphy, C.J., McAuliffe and
Karwacki, J.J. dissent.

Filed: March 12, 1993

We granted certiorari to review the judgment of the Court of Special Appeals, which ordered Clarence Hancock, the respondent, immediately released from prison.

In 1976, the respondent was convicted of murder, attempted murder, and assault and battery. He was sentenced to life imprisonment, plus thirty-five years. In April 1977, the respondent was accepted at Patuxent Institution,[1] as a "defective delinquent."[2]

---

[1] Patuxent Institution was established by the Maryland General Assembly in 1951 to operate, separately and independently from the prisons under the jurisdiction of the Maryland Division of Correction. See Ch. 476, Laws 1951; Md. Code (1951) Art. 31B, § 1, et seq. The purpose was to "provide efficient and adequate programs and services for treatment with the goal of rehabilitation of eligible person." Md. Code (1957, 1990 Repl. Vol), Art. 31B, § 2(b).

[2] A "defective delinquent" was:

> an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity

When the defective delinquent statute was repealed, effective July 1, 1977, see Acts 1977, Ch. 678, the respondent was retained at Patuxent as an "eligible person," i.e.,

> a person who (1) has been convicted of a crime and is serving a sentence of imprisonment with at least three years remaining on it, (2) has an intellectual deficiency or emotional unbalance, (3) is likely to respond favorably to the programs and services provided at Patuxent Institution, and (4) can be better rehabilitated through those programs and services than by other incarceration.

Md. Code (1957, 1976 Repl. Vol., 1980 Cum.

> toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe to society to terminate the confinement and treatment.

Md. Code (1957, 1976 Repl. Vol.), Art. 31B §5.

Suppl.), Art. 31B § 1(g). In 1984, the respondent was approved for accompanied day leave. See Md. Code (1957, 1982 Repl. Vol.), Art. 27, § 700D. In July 1985, pursuant to Md. Code (1957, 1983 Repl. Vol.), Art. 31B, § 10,[3] Hancock was placed in Patuxent's work-release program and in September, his work release status was changed to school-release.[4]

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[3] Section 10(a) provides:

> (a) Eligibility for work release and leave of absence. - Persons transferred to the Institution for treatment are eligible for the work release and leave of absence programs provided for in §§ 700A through 700D-1 of Article 27 of the Code. The functions of the warden or superintendent and the Commissioner under those sections shall be performed by the board of review with respect to persons confined in the Institution.

[4] Md. Code (1957, 1982 Repl. Vol.), Art. 27, § 700A(a) provides:

Pursuant to Art. 27, § 700D, Hancock was approved for unaccompanied leave in 1986.

In 1987, the respondent was recommended for parole. The statute then in effect required gubernatorial approval in the case of an inmate serving a life sentence. Md. Code (1957, 1983 Repl. Vol.), Art. 31B § 11(b)(2).[5] That statute has been enacted in

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(a) Establishment. - The Department of Correction is authorized to establish a "work release" program under which prisoners sentenced to the jurisdiction of the Department may be granted the privilege of leaving actual confinement during necessary and reasonable hours for the purpose of working at gainful private or public employment or attending school as part of a work release program. Such program may also include, under appropriate conditions, releases for the purpose of seeking such employment.

[5] Article 31B §11(b)(2) provided:

(b) Action by board of review prior to expiration of sentence. - At any time after transfer of a person to the Institution for treatment as an eligible person but prior to

1982. See ch. 588, Law 1982. The Governor rejected the recommendation. Subsequently, on December 1, 1988, the work release program was suspended. See Holmes v. Robinson, 84 Md.App. 144, 578 A.2d 294, cert. denied, 321 Md. 501, 583 A.2d 275 (1991).

> the expiration of the person's sentence, the board of review, upon review of the person may take the following action:
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> * * *
>
> (2) If the board of review concludes that (i) it will not impose an unreasonable risk on society; and (ii) it will assist in the treatment and rehabilitation of the eligible person, it shall grant a parole from the Institution for a period not exceeding one year. An eligible person who is serving a term of life imprisonment shall only be paroled with the approval of the Governor. The board of review may attach reasonable conditions to the parole, at any time make reasonable and appropriate modifications of these conditions, and revoke the parole if it finds that the person has violated a condition of the parole. The board of review shall review the person's status prior to the expiration of the parole period, and may extend the parole.

Thereafter, in March 1989, citing "his deteriorating behavior," the Board revoked the respondent's participation in the work release program. The respondent was removed from Patuxent Institution on April 5, 1990, after the Board concluded that he behavior had become "unbefitting [of] continued participation in the program and services" of Patuxent Institution. The bases for this conclusion mirror the allegations which later would be made in support of the petition for parole violation filed by the Board.

We filed our opinion in Gluckstern v. Sutton, 319 Md. 634, 574 A.2d 898, cert. denied sub nom. Henneberry v. Sutton, ___ U.S. ___, 111 S.Ct. 369, 112 L.Ed.2d 331 (1990), on June 7, 1990. In that case, we held that gubernatorial approval could not be required in the case of Patuxent inmates whose life

sentences were for offenses committed before July 1, 1982, the effective date of the statute; the statute could not be applied retroactively. Id. at 669, 574 A.2d at 915.[6] Relying on that decision, the respondent filed an habeas corpus action in the Circuit Court for Baltimore City, in which he challenged the Governor's decision to withhold parole approval.

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[6] In Gluckstern v. Sutton, 319 Md. 634, 574 A.2d 898, cert. denied sub nom. Henneberry v. Sutton, ___ U.S. ___, 111 S.Ct. 369, 112 L.Ed.2d 331 (1990), the trial court ordered "the Institutional Board of Review to afford [the defendant] another parole hearing [based] 'solely on the facts and evidence as they existed when [it] originally considered [the defendant] for parole . . . Id. at 646, 574 A.2d at 904. Should parole be granted, it permitted Patuxent to "seek revocation of such parole . . . on the basis of any actions or conduct . . . of [the defendant[] occurring after" the date he was recommended for parole. The court made clear that release from custody was being ordered only if application for revocation of parole was not filed immediately after the parole hearing. Id. at 647, 574 A.2d at 904. Significantly, we did not pass upon "the propriety of the relief granted or . . . [as to] any specific provisions of the order," since "neither side in this Court complains about the nature of the circuit court's order or about any of its specific provisions . . . ." Id. at 648, 574 A.2d at 904.

The circuit court agreed that Gluckstern applied and, on July 14, 1990, passed the following order:

> . . .[The petitioner] be, and hereby is, directed to parole [the respondent] on or before August 10, 1990, unless [the petitioner] within that time period commences appropriate and legally mandated procedures to revoke [the respondent's] parole, with a copy of the Request For Issuance of Retake Warrant form setting forth particularized grounds for the alleged violation to be served on [the respondent], his counsel and this Court on or before August 10, 1990.

Citing Morrissey v. Brewer, 408 U.S. 471, 483-84, 92 S.Ct. 2593, 2601, 33 L.Ed.2d 484, 495 (1972), the court explained:

> The Court is mindful of the fact that [the respondent] may have engaged in conduct since the initial parole decision by the Board of Review that would militate against his release on parole at this time. Consequently, the Patuxent Board of Review is entitled to review [the respondent's] conduct since the parole recommendation to determine whether he "has in fact breached the conditions of parole."

It concluded:

> Since [the respondent] has not been on parole physically, the Court recognizes he may not have satisfied many of the ordinary terms and conditions of a parole order, e.g. maintaining a job, reporting to a parole officer at specified times. However, these failings are not of his own volition. Therefore, in deciding whether revocation is warranted, the Board of Review should focus on behavior over which [the respondent] has exercised control.

Neither party appealed the judgment.

Consistent with the circuit court's order, the petitioner paroled the respondent.[7] It issued him an

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[7] The panoply of rights usually associated with a criminal case do not extend to violation of parole or probation proceedings. Baldwin v. State, 324 Md. 676, 682-83, 598 A.2d 475, 478 (1991); Bergstein v. State, 322 Md. 506, 520, 588 A.2d 779, 785-86 (1991); Smith v. State, 306 Md. 1, 7, 506 A.2d 1165, 1168 (1986); Dean v. Smith, 291 Md. 198, 202, 434 A.2d 552, 555 (1981). The due process clause of the Federal and State constitutions establishes procedural guarantees that must be afforded a parolee before he/she can be deprived of a liberty interest. See Morrissey v. Brewer, 408 U.S. 471, 484, 92 S.Ct. 2593, 2602, 33 L.Ed.2d 484, 496 (1972) ((1) written notice of claimed violations; (2) disclosure of the evidence against the parolee; (3) opportunity to be heard; (4) right to confront and cross-examine witnesses; (5) a neutral and detached hearing body and (6) written statement of evidence relied upon in revoking parole). See also Black

Order of Parole which expired August 2, 1991 and contained special, as well as general terms and conditions of parole.[8] One of the conditions was General Condition #3: "The parolee shall not commit any act which would be a violation of any Federal,

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v. Romano, 471 U.S. 606, 612, 105 S.Ct. 2254, 2258, 85 L.Ed.2d 636, 642 (1991); Baldwin v. State, 326 Md. at 683, 598 A.2d at 478; Adkins v. State, 324 Md. 641, 655 n.8, 598 A.2d 194, 201-02 n.8 (1991).

[8] The Order of parole required the respondent's acceptance. By accepting, which the respondent did when it was issued to him, he acknowledged understanding and agreed to abide by the terms and conditions of parole and to waive extradition should he violate parole. It also contained four special conditions:

> 1) The respondent must reside in an halfway house;
> 2) The respondent must abstain from use of alcohol or drugs and submit to tests for such substances;
> 3) The respondent must stay away from Ms. Theresa Knight and son; and
> 4) The respondent must attend weekly supervision as directed.

Eighteen general conditions of parole were also prescribed.

State Law or Municipal ordinance; and shall conform to all rules of conduct imposed upon him by the Patuxent Institution or authorized representative." Simultaneously, the petitioner served the respondent with a Preliminary Hearing Notice[9] notifying him of the purpose of the hearing - to determine whether probable cause exists to believe he violated parole and the consequences of that finding, - and a Request for Parole Revocation Warrant, charging the respondent with violation of parole, i.e. General Condition #3.

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[9] Maryland Rule 4-222(b) provides that "an adult . . . shall be released on personal recognizance under terms and conditions that do not significantly restrain the defendant's liberty unless the judicial officer determines that there is probable cause to believe that the . . . defendant committed the offense . . . ." Because the petitioner had paroled the respondent, he ordinarily would have been entitled to immediate release. He could be held in custody pending the parole revocation hearing only if the hearing officer were to find probable cause to believe that the respondent violated his parole and, thus, on that account, declined to release him.

Specifically, the Board charged that during his last year at the Institution, the respondent refused fully to participate in the program services "vital to his successful rehabilitation," that, in "repeated instances," he "refused to discuss essential aspects of the motivation for his crime and the factors necessary to prevent its recurrence," and that, despite repeated encouragement, "he consistently failed to cooperate in his treatment" and addressed counseling sessions "in an unsatisfactory manner."

After the preliminary hearing, probable cause to believe that the respondent failed to "conform to all rules of conduct imposed upon him by the Patuxent Institution or an authorized representative," having been found, the hearing officer ordered the respondent's detention at Patuxent pending a formal

parole revocation hearing.

Dr. Farrell, an institutional psychologist, who had seen the respondent in group therapy, testified at the formal revocation hearing. Concerning the respondent's participation in therapy, he said that the respondent would become "evasive and general" in response to his questions and that he did not respond "favorably" to, nor "cooperate" in, treatment. Dr. Farrell asserted that, indeed, the respondent had not progressed as far as Dr. Farrell felt he should have. Consequently, he recommended against the respondent being released into the community. The Board agreed. Concluding that the respondent "failed to comply with the instructions and directives of his therapist . . . [and] thwarted the purpose and mission of the Institution," it found him in violation of the terms and

conditions of his parole.

The respondent appealed to the Circuit Court for Howard County. That court affirmed, stating, "none of the bases set forth in [Maryland Code (1984)] Section 10-215(g)(3) [of the State Gov't Article[10] for

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[10] Maryland Code (1984) § 10-215(g)(3) of the State Government Article states that:

> (g) Decision. - In a proceeding under this section, the court may:
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> (3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision of the agency:
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> (i) is unconstitutional;
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> (ii) exceeds the statutory authority or jurisdiction of the agency;
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> (iii) results from an unlawful procedure;
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> (iv) is affected by any other error of law;
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> (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
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> (vi) is arbitrary or capricious.

a reversal or modification of the Board's decision have been found." The Court of Special Appeals, in an unreported opinion, reversed. Holding that "revo[cation of appellant's] parole, based on conditions that appellant was not made aware of until the moment his parole was revoked, is a violation of appellant's due process rights under Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution," it ordered the respondent's immediate release from incarceration "pursuant to the terms of the 19 November 1987 Review Board decision."

The Patuxent Institution Board of Review filed a petition for certiorari and a motion to stay the execution of the mandate of the Court of Special Appeals. We granted both the petition and the stay.

I.

Characterizing the intermediate appellate court's decision as being based upon the failure of the petitioner physically to release the respondent before initiating revocation proceedings, the petitioner argues that, in ordering the respondent's release on parole, the Court of Special Appeals reversed a final judgment entered by the Circuit Court for Baltimore City in prior, separate proceedings. That judgment, which the respondent did not appeal, prescribed the procedure the petitioner followed in revoking the respondent's parole in this case: it ordered the respondent's release "unless he '. . . has in fact acted in violation of one or more conditions of his parole [agreement],' authorized review [of the respondent's] conduct since the parole recommendation to determine whether he 'has in fact

breached the conditions of parole'" . . .; and directed the petitioner to "focus on behavior for which [the respondent] has exercised control." It asserts, furthermore, that the reversal was on a ground that was not raised by the respondent at any stage of the proceedings. As the petitioner sees it, the July 1987 court order finally and validly determined whether parole revocation proceedings could be initiated, and concluded, prior to the physical release of the parolee. The Court of Special Appeals' holding, referring to the procedure the petitioner followed, that "[i]t was utterly at variance with the concept of due process of law and basic fairness to charge the [respondent] with a violation of a condition of parole when he was not on parole . . .," the petitioner maintains, constitutes "a collateral attack on a long-since final order of the

Circuit Court for Baltimore City." The petitioner's brief at 11.

The respondent does not dispute that he did not challenge, at the administrative hearing, before the Circuit Court for Howard County, or on appeal to the Court of Special Appeals, the petitioner's right to revoke his parole before he had been physically released. In fact, he does not question, in this Court, either the validity or the propriety of the July 24, 1990 order of the Circuit Court for Baltimore City. The respondent does dispute the petitioner's characterizations of the holding of the Court of Special Appeals, and, hence, the issue before this Court. He asserts that the intermediate appellate court held what he has argued from the beginning, that due process was offended when his parole was violated on the basis

of a condition of which he had not been previously apprised. Thus, as the respondent sees it, the issue before this Court is not whether he could have been charged with violating his parole when he was not on parole, but rather it is about the notice due a parolee before parole may be violated.

We agree with the respondent. The Court of Special Appeals neither decided nor purported to decide whether due process was offended by parole revocation proceedings initiated before the respondent's physical release, in other words, before he was paroled.

The intermediate appellate court did not address the merits or propriety of the July 24, 1990 order. That court acknowledged, agreeing with the petitioner, that neither that order nor the procedure it prescribed

was before it. It was emphatic, however, that

> [w]hat is before this Court is the decision of the Circuit Court for Howard County affirming the decision of the Patuxent Institution Board of Review's revocation of appellant's parole. As to the decision affirmed by the Circuit Court for Howard County and thus before us on this appeal, the Board of Review violated the appellant's right to due process of law by revoking his parole based on what is claims to be a violation of a condition of his parole of which he had never been given notice. The Circuit Court for Baltimore City could not authorize the Board of Review to do that; and its ruling cannot be construed as authorizing the Board of Review to deny appellant due process of law. The most onerous interpretation of the ruling of the Circuit Court for Baltimore City and the habeas corpus proceeding is that appellant's parole could be revoked before he was released if he had violated some law or engaged in conduct that any parolee may be presumed to know would be a parole violation. Appellant had no reason to appeal that ruling.

Slip op. at 7-8.

The Court of Special Appeals decided this case on an issue that the record reflects troubled the

respondent from the very beginning,[11] the adequacy

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[11] At the administrative hearing, the respondent's counsel commented, during cross-examination of the petitioner's chief witness, that he was "still not entirely clear what rule Mr. Hancock violated." In his Petition for Reversal of Administrative Agency Action, filed in the Circuit Court for Howard County, in addition to contending that the "proceedings and decisions violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution," the respondent argued: "Patuxent could not, and did not, identify a valid rule or regulation that [he] allegedly violated" and that "assuming, arguendo, that the alleged conduct occurred, Patuxent failed to identify a valid parole condition that encompasses the alleged misconduct." Before the Court of Special Appeals, the respondent presented five issues, three of which clearly implicate the adequacy of the notice he received:

> 1. When there is no parole condition requiring the attendance in therapy, does the revocation of Mr. Hancock's parole for alleged failing in therapy violate constitutional due process?
> 2. Can a therapist impose oral conditions regarding therapy when there is no written condition requiring Mr. Hancock to attend therapy?
> 3. Is it unconstitutionally vague and overbroad to apply a general parole condition requiring obedience to all laws and rules of conduct to alleged failings in therapy?

In his reply brief at p.2 in the Court of Special Appeals, the respondent lamented, "[he[was charged with violating

of the notice he was given of the conditions of his parole. Indeed, that is precisely what the court said:

> We agree with appellant that revoking his parole, based on conditions that appellant was not made aware of until the moment his parole was revoked, is a violation of appellant's due process rights under Article 24 of Maryland Declaration of Rights of the Fourteenth Amendment to the United States Constitution.

Slip op. at 4. This is also made crystal clear when the court's opinion is read in its full context. After noting that parole revocation proceedings consist of two steps, quoting Morrissey v. Brewer, 408 U.S. 471, 479-80, 92 S.Ct. 2593, 2599, 33 L.Ed.2d 484, 493 (1972), the court said:

> The actions of the Review Board at Patuxent prevent us from even considering the first step [i.e. the factual determination whether the parolee has violated one or

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terms and conditions of parole by conduct which allegedly occurred before he ever received notice of those terms and conditions." (emphasis added).

> more conditions of parole]. Appellant was never apprised of the conditions of his "short-lived" parole. The Gluckstern [v. Sutton, 319 Md. 634, 574 A.2d 898, cert. denied, ___ U.S. ___, 111 S.Ct. 369, 112 L.Ed.2d 331 (1990)] decision eliminated the gubernatorial approval requirement for Patuxent inmates serving life sentences for offenses permitted before 1 July 1982. Appellant falls into this class of Patuxent inmates. It was utterly at variance with concepts of due process of law and basic fairness to charge appellant with a violation of a condition of parole when he was never on parole and had never been apprised of what the conditions of his parole would be. Perhaps Patuxent's proceedings would have been more colorable if appellant had violated some state or federal law. Such is not the case. At the revocation hearing, Patuxent personnel testified that appellant had not broken any law or violated any institutional disciplinary rule. It is alleged that appellant violated the last directive of General Condition Number 3, by failing to "conform to all rules of conduct imposed upon him by Patuxent Institution or an authorized representative."

Slip op. at 6-7 (emphasis added). Later, when summarizing its decision, the court observed:

> [A]ppellant was entitled to know the conditions of his parole in order that he be able to protect his liberty interest in

> remaining free, once he was actually released. "[W]hen notice is a person's due, process which is mere gesture is not due process." Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306, 315, 70 S.Ct. 652, 657, 94 L.E#d. 865 [,874] (1950).

To be sure, the court did comment that the respondent "was never on parole," and referred to the Gluckstern decision, which buttresses that point. Adding "and he has never been apprised of what the conditions of his parole would be," clearly gave its comment context and meaning. Its reference to Gluckstern may also be read as the court again making the point that the respondent, having never been paroled, had never previously been apprised of the conditions of his parole.

The Court of Special Appeals, not having decided the issue on the ground alleged by the petitioner and, furthermore, the ground upon which it

did decide the case having been properly raised at every stage of the proceeding, which the petitioner does not seriously dispute, the matter is properly before us.

A.

Before we can determine whether the respondent's parole was properly revoked, we must consider the nature of parole and its function in the corrections context. The Supreme Court has said, "[t]he essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." Morrissey, 408 U.S. at 477, 92 S.Ct. at 2598, 33 L.Ed.2d at 492 (1972). Our Legislature has defined it as "a conditional release from imprisonment, granted by the Maryland Parole

Commission . . . [which] entitled the recipient . . . to leave the institution in which he is imprisoned, and to serve the remainder of his term outside the confines thereof . . . ." Md. Code (1957, 1990 Repl. Vol.) Art. 41, § 4-501(5). See also Murray v. Swenson, 196 Md. 222, 229, 76 A.2d 150, 153 (1950). The purpose of parole is to help individuals reenter society and to alleviate the costs to society of keeping an individual in prison. Morrissey, 408 U.S. at 477, 92 S.Ct. at 2598, 33 L.#d. 2d at 492. While the executive branch, usually through a parole board, is vested with the authority to grant parole and implement its purpose, it is the legislature that establishes the governing procedures and criteria. Arthur W. Campbell, Law of Sentencing § 17:6, at 449 (2d ed. 1991). Thus, parole is a matter of legislative grace,

not of constitutional right. Vitek v. Jones, 445 U.S. 480, 488, 100 S.Ct. 1254, 1261, 63 L.Ed.2d 552, 562 (1980); Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1, 7, 99 S.Ct. 2100, 2104, 60 L.Ed.2d 668, 675 (1979); Dunn v. Cal. Dept. of Corrections, 401 F.2d 340, 342 (9th Cir. 1968); Matthews v. State, 304 Md. 281, 292, 498 A.2d 655, 661 (1985); Hutchinson v. State, 292 Md. 367, 369, 438 A.2d 1335, 1336 (1982); Belch v. Raymond, 196 Md. 649, 650, 75 A.2d 96, 97 (1950). Although in Maryland, the parole Commission ordinarily has exclusive discretionary power to "[a]uthorize the parole of individuals sentenced under the laws of this State to any penal or correctional institution, jail, or other place of confinement or detention within the State," art. 41, § 4-504(a)(1), in

the case of a prisoner at the Patuxent Institution, it is the Board of Review that is given that discretion. Md. Code (1957, 1990 Repl. Vol.), Art. 31B, § 6(c)(2). This has been the policy since the creation of the Institution.

Parole refers to the administrative action taken after the prison door has closed on the defendant, State v. Hewitt, 270 N.C. 348, 352, 154 S.E.2d 476, 479 (1967), while probation, which may be ordered as a part of a split sentence, see Md. Code (1957, 1992 Repl. Vol.), Art. 27, § 641A(c); Matthews v. State, 304 Md. 281, 498 A.2d 655 (1985), ordinarily refers to judicial action taken prior to its being closed. Hewitt, 270 N.C. at 352, 154 S.E.2d at 479. Notwithstanding that parole and probation differ in terms of when they occur in the correctional process,

each enables criminal offenders to serve at least part of their sentences in the community rather than in prison and requires the offenders to adhere to prescribed conditions in order to retain their conditional freedom. Neil P. Cohen and James J. Gobert, The Law of Probation and Parole, § 1.01, at 4-5 (1983). Because both the revocation of parole and the revocation of probation pertain to punitive sanctions imposed on a defendant for the commission of a criminal act, Bergstein v. State, 322 Md. 506, 515, 588 A.2d 779, 783 (1991), for due process purposes, there is no relevant difference. Gagnon v. Scarpelli, 411 U.S. 778, 782, 93 S.Ct. 1756, 1759-60, 36 L.Ed.2d 656, 661-62 (1973).

Since parole is a matter of grace and not of right, the state may condition continuance of parole on

the parolee's compliance with certain prescribed conditions. Morrissey, 408 U.S. at 478, 92 S.Ct. at 2598, 33 L.Ed.2d at 492. Such conditions may restrict the parolee's conduct and activities "substantially beyond the ordinary restrictions imposed by law on an individual citizen," id., so long as they are not illegal or unrelated to rehabilitative purpose, or impossible to perform. Arciniega v. Freeman, 404 U.S. 4, 4, 92 S.Ct. 22, 22, 30 L.Ed.2d 126, 127 (1971); Campbell, § 17.9, at 464. Generally, such conditions have been held proper when they are not vague, indefinite or uncertain, Smith v. State, 306 Md. 1, 7, 506 A.2d 1165, 1168 (1986), and until they are agreed to by the offender, the grant of parole is ineffective. Hopkins v. North, 151 Md. 553, 135 A. 367 (1926); Campbell, supra, § 17.9, at 465. See also Lanzetta v. N.J., 306

U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888, 890 (1939) (criminal defendant entitled to be informed of what the State commands and forbids); Costa v. State, 58 Md.App. 474, 483, 473 A.2d 942, 946-47 (1984) (agent's instructions to probationer to enter drug therapy not within the general condition that probationer follow agent's instructions).

There are usually two types of conditions. The first type forbids conduct which is also prohibited to the ordinary citizen, e.g., commission of a criminal offense. The other regulates conduct in areas not affecting the ordinary citizen or in which the ordinary citizen is entirely free to act. Examples of this type of condition include requiring compliance with institutional conditions, prohibiting associations, and regulating the consumption of alcohol, interstate travel,

possession of firearms, curfews, and the frequenting of certain places. See Morrissey, 408 U.S. at 478, 92 S.Ct. at 2598-99, 33 L.Ed.2d at 492, Cohen and Gobert, supra, § 4.04 at 165-66. See also Michael Gottesman and Lewis J. Hecker, Note, Parole: A Critique of Its Legal Foundations and Conditions, 38 N.Y.U.L. Rev. 702, 720-21 (1963). A violation of either type may result in revocation of parole, but, in the latter, there is more room for the exercise of discretion. Id. at 721. While parole may be revoked if the parolee fails to comply with one or more parole conditions, Art. 41, § 4-511(a); Smith, 306 Md. at 7, 506 A.2d at 1168; Howlett v. State, 295 Md. 419, 425, 456 A.2d 375, 378 (1983); Dean v. State, 291 Md. 198, 202, 434 A.2d 552, 554 (1981), non-compliance must occur when the offender is on parole.

State v. Miller, 289 Md. 443, 446, 424 A.2d 1109, 1111 (1981); State v. Berry, 287 Md. 491, 499, 413 A.2d 557, 562 (1980); Cornish v. State, 65 Md.App. 213, 214, 500 A.2d 295, 295 (1985); Cohen and Gobert, supra, § 9.05, at 4.23.

Miller and Berry, albeit dealing with probation, are instructive. In Berry, the State alleged that the defendant violated probation by failing to pay support and maintenance for his wife and children. 287 Md. at 499, 413 A.2d at 559. The alleged violation occurred during the probation period, but the revocation proceedings were not completed until probation had expired. In Miller, the defendant, who had ~~been~~ convicted of breaking and entering and possession of narcotics paraphernalia, was placed on probation in lieu of a suspended sentence. After the

probationary period had expired, he was charged with, and convicted of, violating the terms and conditions of his probation. The defendant argued on appeal that the trial court lacked jurisdiction to revoke his probation since the arrest warrant was issued, and the revocation hearing was held, after probation expired. 289 Md. at 444, 424 A.2d at 1110.

We held in both cases that probation revocation proceedings may be pursued and may be held after the probationary period has expired, so long as the act constituting a violation of probation occurred during the probationary period. 289 Md. at 446, 424 A.2d at 1111; 287 Md. at 499, 413 A.2d at 562. Revocation of probation, in other words, must be based on conduct occurring subsequent to the grant of probation, but prior to its expiration. See Dean, 291 Md. at 203, 434

A.2d at 555, in which, reversing a judgment finding the probationer in violation of probation, we commented, "if the trial court had relied solely upon independent, probative evidence showing that the probationer had committed a crime subsequent to probation, revocation of probation would have been appropriate." (emphasis added). See also Cornish, 65 Md.App. 213, 500 A.2d 295 (1985) (probation revocation reversed where State failed to prove new conviction was based on conduct occurring during period when the probationer was subject to the condition violated). Compare Soden v. State, 71 Md.App. 1, 523 A.2d 1015 (1987) (Although no direct evidence of dates of commission of offenses was presented, evidence was sufficient to establish that the defendant could only have committed crimes following

his release from prison, thus during his probationary period); Nelson v. State, 66 Md.App. 304, 503 A.2d 1357 (1986) (Subsequent convictions were for violations of the law occurring while the appellant was on probation).

Other jurisdictions are in accord. In Demchak v. State, 351 So.2d 1053 (Fla. Dist. Ct. App. 1977), the defendant, on probation since April 28, 1975, was convicted of offenses occurring on or about March 13, 1975 and continuing through May 5, 1975. Id. at 1054. The lower court's judgment revoking probation was reversed, the appellate court holding that while probation may be revoked on the basis of a conviction for a subsequent crime, the illegal activity giving rise to the conviction must occur during the probationary period; "[i]mproper conduct occurring prior to entry of

the probation order cannot be the basis for revocation even though the conviction resulting from such conduct occurs while the defendant is on probation." Id. (emphasis added). See also U.S. v. Drinkall, 749 F.2d 20 (8th Cir. 1984) (act occurring before conviction); U.S. v. Paden, 558 F.Supp. 636 (D.C. Cir. 1983) (conduct occurring after end of maximum period of probation); Martinez v. Kirbens, 710 P.2d 1138 (Colo. Ct.App. 1985) (conduct occurring after end of maximum probation period); Hinton v. State, 462 So.2d 583 (Fla. Dist. Ct. App. 1985) (violation occurring prior to entry of probation order); Bell v. State, 656 S.W.2d 502 (Tex. Ct. App. 1982) (cannot revoke probation for violation occurring before judgment placing the defendant on probation); Bryce v. Commonwealth, 414 S.E.2d 417 (Va. App. 1992)

(Where conditioned one future good conduct, revocation must be predicated on conduct occurring subsequent to imposition of suspension).

An exception, recognized in this State, see Matthews v. State, 304 Md. 281, 498 A.2d 655 (1985), permits rescission of parole or probation for misconduct occurring after parole or probation has been granted, but before it becomes effective. Cohen & Gobert, § 4.04 at 165. In Matthews, the defendant was sentenced to five years' imprisonment with all but nine months suspended and three years' probation upon his release from custody. Id. at 283, 498 A.2d at 656. While still in custody, serving his sentence, but on work release, he was arrested and subsequently convicted of violations of the controlled dangerous substance laws, receiving a sentence of imprisonment.

Id. at 283-84, 498 A.2d at 656. The defendant was then convicted of violating his probation and the suspension of that portion of the sentence not served was stricken. We rejected the defendant's argument that he could not lawfully be on probation while serving a prison sentence, id. at 284, 498 A.2d at 656, and thus could not have violated probation. We held that "a trial court has the authority to revoke probation for criminal acts committed after the imposition of sentence but before service of probation based on a condition implicit in the grant of probation that the defendant obey all laws." Id. at 292, 498 A.2d at 660 (emphasis added, footnote omitted). See also U.S. v. Veatch, 792 F.2d. 48 (3rd Cir.), cert. denied, 479 U.S. 933, 107 S.Ct. 407, 93 L.Ed.2d 359 (1986) (revocation of probation for conviction of new offenses

committed before commencement of probation term but after sentence imposed); U.S. v. Wright, 744 F.2d 1127, 1130 (5th Cir. 1984) (revocation of probation before probationary term begins permitted if the defendant commits an illegal act); U.S. v. Dove, 570 F.2d 840, 844 (9th Cir. 1977) ("Knowledge of the criminal law is imputed on the [parolee] as is an understanding that violation of the law will lead to the revocation of [parole]"); Layson v. Montgomery, 251 Ga. 359, 306 S.E.2d 245 (1983) (revocation of probation for conduct occurring after entry of order of probation but before service of probation begins); State v. Sullivan, 197 Mont. 395, 642 P.2d 1008 (1982) (revocation of probation for violation occurring before commencement of probation term but after imposition of sentence); Lee R. Russ, Annotation, Power of Court

to Revoke Probation for Acts Committed After Imposition of Sentence But Prior to Commencement of Probation Term, 22 A.L.R. 4th 755 (1983). Judge McAuliffe, speaking for this Court, put it thusly:

> If, at any time before the defendant has completed the maximum period of probation, or before he has begun service of his probation, he should commit offenses of such a nature as to demonstrate to the court that he is unworthy of probation . . . the court could revoke or change the order of probation.

Matthews, 304 Md. at 291, 498 A.2d at 660 (quoting Com. v. Dickens, 327 Pa. Super. 147, 475 A.2d 141 (1984)).

Parole also may be rescinded when it has been obtained by means of fraud or lack of candor. Cohen & Gobert, supra, § 9.05 at 423. In U.S. v. Kendis, 883 F.2d 209 (3rd Cir. 1989), an attorney, who, pursuant to a plea agreement, pled guilty to bank

fraud, was sentenced to five years imprisonment, with all but six months suspended, in lieu of five years probation. A requirement of the plea agreement was that he pay restitution to the potential victims of the fraud. Prior to the start of the probationary period, the government moved to revoke the defendant's probation, maintaining that he used money entrusted to him by other clients to make restitution. Id. at 210. The court affirmed the revocation of probation even though the conduct on which it was based occurred prior to service of probation. It opined that revocation was proper because the defendant "relied heavily on his acts of restitution to persuade the district court to give him a relatively light prison sentence . . . and . . . failed to reveal that restitution had been made with clients' money." Id. See also Bryce v. Como, 414

S.E.2d at 418 (use of assumed name at trial constituted fraud on the court).

Conduct which not only occurred before the parole or probation decision was made but was known to the granting authority may, but need not, support rescission. Compare Fox v. U.S. Parole Comm'n, 517 F.Supp. 855 (D. Kan. 1981) with Ready v. U.S. Parole Comm'n, 483 F.Supp. 1273 (N.D. Pa. 1980). Cohen and Gobert have analyzed the results and their effect:

> It is submitted that the result in Fox makes better sense in light of the purposes of parole. If the basic goal is to release individuals who are rehabilitated and who are likely to live a crime-free life in the community following release, any information bearing on that decision, no matter when received should be considered. Indeed, ignoring such information may do the public a grave disservice since it could result in the release of a dangerous individual. To place on the parole board the responsibility for a full investigation of all

> allegations, rumors, and the like may also be overly burdensome. On the other hand, the Fox court's approach, unlike that of the court in Ready, has the disadvantage of potentially subjecting parole and probation decisionmakers to community and political pressures to rescind an already fixed release date. It also encourages the board to be less than thorough in preparing cases for decision.

Cohen & Gobert, § 45, at 168.

The Circuit Court for Baltimore City issued an order requiring the petitioner to parole the respondent and to release him form custody unless it filed, within a specified time an action for violation of parole and subsequently proved the violation.[12] The court contemplated and, indeed, stated, that the Board would

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[12] As we stated, granting parole is purely an executive function, Murray v. Swenson, 196 Md. 222, 229, 76 A.2d 150, 153 (1950), not a judicial one. Consequently, the judiciary cannot grant parole, its function is limited to granting probation. See Simms v. State, 65 Md.App. 685, 689, 501 A.2d 1338, 1341 (1986). In this case, the circuit court did not parole the respondent, it ordered Patuxent Institution's Board of Review to do so.

be "entitled to review [the respondent's] conduct since the [1987] parole recommendation to determine whether he 'has in fact breached the conditions of parole.'" Although it did not order a new parole eligibility determination, only parole and a revocation hearing, the order in this case is reminiscent of the trial court's order in Gluckstern, the merits of which we did not reach. See note 6, supra. That the court ordered the petitioner to parole the respondent and then conduct revocation proceedings was obvious to all parties. Although we had never passed on such an order, undoubtedly, the petitioner believed it was proper and, more important, that it could meet the burden that the order imposed. Therefore, based on that order, and without noting an appeal to challenge its appropriateness, it served on the respondent an

Order of Parole, which expired one year later, including special and general terms and conditions of parole, a Request for Parole Revocation Warrant, charging the respondent with violation of parole, and a notice of preliminary hearing. The parole violation, it was alleged, occurred in 1989, the respondent's last year at the Patuxent Institution.

The petitioner does not argue, and the facts do not indicate, that the respondent violated any condition of parole after August 1990, when he was served with the Order of Parole. Indeed, between April 1990 and that date, he was not even at Patuxent. Moreover, the petitioner does not assert, and the evidence does not support, that the respondent broke any laws either prior to, or after August 8, 1990. Nor is there a contention that the respondent defrauded the court in

order to obtain parole. The contention is, and the evidence was offered to prove, rather, that the respondent violated parole by failing to conform to a rule of conduct imposed upon him by the Patuxent Institution or authorized representatives, i.e., to cooperate with his therapist. That conduct occurred, and was evident, prior to the respondent's parole. The respondent had not, at that time, been paroled or apprised of the conditions that would pertain were he paroled, however.

In Gluckstern, the trial court ordered, as the appropriate relief for violation of the defendant's rights, a new parole hearing. Only if parole were granted after that hearing did the court authorize revocation of parole and, then, only "on the basis of any actions or conduct . . . occurring after [the date he

was recommended for parole]." 319 Md. at 647, 574 A.2d at 904. The trial court in this case did not order a new parole hearing even though it probably could have - much had changed since 1987 when the Board recommended the respondent for parole and the Board undoubtedly perceived the respondent as no longer eligible for parole, a fact of which the court was made aware. Instead, the court ordered the Board to parole the respondent and revocation proceedings to forestall the respondent's actual release from custody were authorized.

The Baltimore City Circuit Court's order can only be construed as authorizing revocation proceedings after parole had been ordered and to permit those proceedings on the basis of conduct occurring before parole was either recommended or

ordered and even though it is not proscribed by any parole condition. A court may not, however, authorize revocation of parole or probation on a ground not otherwise permitted by law. See also Baldwin v. State, 324 Md. 676, 684, 598 A.2d 475, 479 (1991) (decision to revoke probation may not be based on an improper ground). Parole may be revoked for violation of a condition of parole during the term of parole, for commission of a crime, whether or not the parole term has started, or for misconduct occurring either before, or after, the grant of parole. When violation of a condition of parole is alleged, the parolee must be aware that the conduct constituting the violation is prohibited by a condition of parole. None

of the foregoing has occurred in this case.[13]

II.

A.

The fact that a parole system exists does not, in and of itself, give rise to a constitutionally protected liberty interest in parole release. Bd. of Pardons v. Allen, 482 U.S. 369, 373, 107 S.Ct. 2415, 2418, 60 L.Ed.2d 668, 676 (1987). On the other hand, a statute, administrative rules or regulations, or accepted practices may provide such an interest. Cohen & Gobert, supra, §§ 3.13-3.16, at 133-140. Whatever its

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[13] The petitioner also maintains that, because the Board's decision to revoke the respondent's eligible person status was based on acts committed after the Board's initial recommendation to the Governor in 1988, its actions were consistent with Matthews v. State, 304 Md. 281, 498 A.2d 655 (1985). Whether that is so, or not, is a matter that is not before us. The respondent does not challenge that action. It should be noted, however, that revocation of eligible person status and revocation of parole, once granted, may rest on entirely different considerations.

source, in order that parole be given effect, there must be "justifiable reliance on maintaining [a] conditional freedom" instead of a "mere anticipation or hope of freedom." Morrissey, 408 U.S. at 482 n. 8, 92 S.Ct. at 2601 n. 8, 33 L.Ed.2d at 495 n. 8, quoting U.S. ex rel. Bey v. Conn. Bd. of Parole, 443 F.2d 1079, 1086 (2nd Cir.), vacated as moot, 404 U.S. 879, 92 S.Ct. 196, 30 L.Ed.2d 159 (1971). This is so because there is a critical and substantial difference between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires, Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1, 9, 99 S.Ct. 2100, 2105, 60 L.Ed.2d 668, 676 (1979); "[T]here is a human difference between losing what one has and not getting what one wants." Id. at 10, 99 S.Ct. at 2105, 60

L.Ed.2d at 677, quoting Bey, 443 F.2d at 1086. (citations omitted). Procedural due process protections extend to the parolee's situation because "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others." Morrissey, 408 U.S. at 482, 92 S.Ct. at 2601, 33 L.Ed.2d at 494-95. See also Greenholtz, 442 U.S. at 10, 99 S.Ct. at 2105, 60 L.Ed.2d at 676.

In 1987, the former director of Patuxent Institution recommended the respondent for parole; at that time, the statute required the Governor to approve the parole of all inmates serving life sentences at the Institution. That we subsequently held gubernatorial approval to be unconstitutional as applied to inmates such as Hancock, whose crimes were committed prior

to 1982, 319 Md. at 669, 576 A.2d at 915, thus rendering the Governor's approval unnecessary, did not change the nature of the Board's actions. A recommendation of parole did not automatically become an order of parole. Therefore, that action did not give the respondent a liberty interest. In Gluckstern, we did not hold that the excision of the gubernatorial recommendation requirement entitled the inmate to be released immediately.

The Board never paroled the respondent either before or after the Governor's rejection, nor did it issue an order after the Gluckstern opinion. Thus, the respondent could not justifiably have relied on the 1987 recommendation to maintain conditional freedom. Indeed, the respondent never achieved conditional freedom pursuant to that recommendation. In short,

the recommendation merely furnished the respondent with an anticipation or hope of freedom. Morrissey, 408 U.S. at 482 n. 8, 92 S.Ct. at 2601 n. 8, 33 L.Ed.2d at 495 n. 8.

B.

The August 1990 circuit court order did not parole the respondent. While it directed the petitioner to do so absent the occurrence of a certain condition, that order also did not provide the respondent with a liberty interest in parole release.[14] On the other hand, when, on August 8, 1990, it served the respondent with an Order of Parole and a copy of a

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[14] The court order by its terms, provided due process protection for the respondent. Release was mandated unless "appropriate and legally mandated procedures to revoke parole" were commenced immediately. If such proceedings were initiated, the order required a revocation hearing be held to establish whether the respondent violated parole. Of course, it required that the respondent be given notice of the violations alleged.

parole agreement, the petitioner effected the respondent's parole and, in the process, created in him a liberty interest in parole release. It is the order of parole, which, by its terms, was for one year, from which the liberty interest flowed. The circuit court order merely set the stage.

Notwithstanding its failure to object to the circuit court order and to file an appeal challenging the court's authority to pass it, the petitioner asks us to declare the order invalid and to excuse its own omission. It focuses on the facts that the respondent has never been released from custody and that, indeed, the court only ordered his release in the event that the petitioner did not proceed with revocation proceedings. From these premises, the petitioner argues that the respondent never acquired a liberty interest because a

person who is actually on parole occupies a position that "is very different from that of confinement in a prison." Morrissey, 408 U.S. at 482, 92 S.Ct. at 2601, 33 L.Ed.2d at 495. It relies on Jago v. Van Curen, 454 U.S. 14, 102 S.Ct. 31, 70 L.Ed.2d 13 (1981).

Jago is inapposite. There, a prisoner received a favorable parole decision, which was communicated to him along with a parole agreement stating that he had "earned the opportunity of parole" and that the Board "is therefore ordering a Parole Release in your case." 454 U.S. at 15, 102 S.Ct. at 33, 70 L.Ed.2d at 16. Before that decision was made effective, the parole board, having learned that he had not been entirely truthful during his hearing, rescinded it. It did so without first affording the prisoner a hearing. Id.

The Court of Appeals for the Sixth Circuit held that the "mutually explicit understanding" created between the prisoner and his parole board by the latter's original affirmative recommendation, id. at 16, 102 S.Ct. at 34, 70 L.Ed.2d at 16, gave the prisoner a liberty interest. The Supreme Court rejected the appellate court's analysis and opined, "mutually explicit understanding" could engender property interests, but not a liberty interest. Id. at 17, 102 U.S. at 34, 70 L.Ed.2d at 17-18. It observed further that, in property interest cases, there often is an implied contract aspect of the understanding which is not present in parole cases. Id. The Court concluded that, since the prisoner did not have a statutorily protected interest and a mutually explicit understanding could not create one, he was not entitled to a hearing, the due

process clause being inapplicable. Id. at 21, 102 S.Ct. at 36, 70 L.Ed.2d at 19.

The facts sub judice, contrasted with those in Jago, reveal that the respondent's parole was so far effectuated that he had been served with the Order of Parole, apprising him of the terms and conditions with which he was required to comply, which he signed, both acknowledging the conditions and accepting them and the parole. The respondent in Jago had not been paroled, but merely recommended for parole. The critical decision in the case before us was not favorably to recommend parole; rather, it was to grant it. Such a decision may not, without complying with due process, be rescinded based on new information discovered before physical release has actually occurred. Moreover, in this case, unlike in Jago, a

parole revocation hearing was mandated by the order pursuant to which the prole order was issued and the revocation proceedings were authorized and, of course, the Order of Parole created a liberty interest.[15] As the Court of Special Appeals put it: the respondent was accorded the rights of a parolee.

The petitioner is correct; the order of the Circuit Court for Baltimore City is a final order which may not be attacked collaterally. See Coles v. State, 290 Md. 296, 303, 429 A.2d, 1029, 1032 (1981). That prohibition, however, also extends to the petitioner. Having fully complied with the court order and paroled

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[15] The court order may well have been inartfully drafted. Although it states that parole is conditioned on the petitioner's initiation of revocation proceedings, the context makes clear that it is the respondent's release from custody that it is intended to address. Revocation proceedings may necessitate detention of the parolee pending their resolution; they do not require, nor negate, the parole decision.

the respondent, i.e., accorded him the rights that status requires and that the court's order mandated, the petitioner may not now argue that it need not have done so. The court order, after all, pertained to a matter over which the court was competent to act. See Stewart v. State, 287 Md. 524, 526 413 A.2d 1337, 1338 (1980); First Federated Commodity Trust Corp. v. Comm'r of Securities, 272 Md. 329, 334, 322 A.2d 539, 543 (1974).

C.

The petitioner next contends that the respondent's parole eligibility should have been determined under the 1977 statute, see Maryland Code (1957, 1976 Repl. Vol., 1980 Cum. Suppl.) Art. 31B,

§ 11(b),[16] the inapplicability of the 1982 statute

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[16] See infra note 5. Article 31B, § 11(b)(1)-(2) provides:

> (b) Action by board of review prior to expiration of sentence. - At any time after transfer of a person to the Institution for treatment as an eligible person but prior to the expiration of the person's sentence, the board of review, upon review of the person may take the following action:
>
> (1) If the board of review concludes that the person is no longer an eligible person but should remain confined until released on parole in accordance with normal Parole Commission standards or expiration of his sentence or the inmate requests a transfer in writing, the director shall notify the Commissioner and send him a copy of the evaluation team's report. Within 90 days after that notice, the person shall be delivered to the appropriate correctional facility designated by the Commissioner. This transfer shall not affect any right to parole consideration that the person may then have.
>
> (2) If the board of review concludes that (1) it will not impose an unreasonable risk on society and (2) it will assist in the treatment and rehabilitation of the eligible person, it shall grant a parole from the Institution for a period not exceeding one year. The board of review

having been established. It maintains that the respondent was not eligible under the statute. As we have seen, the trial court ordered the petitioner to parole[17] the respondent. At no time, either before or after that order, was the issue of the respondent's eligibility for parole under the pre-1982 statute raised and, of course, the court did not address it. By ordering the respondent's parole, the court necessarily assumed his present eligibility, whether under the pre-1982 statute or the 1982 statute after the gubernatorial

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> may attach reasonable conditions to the parole, at any time make reasonable and appropriate modifications of these conditions, and revoke the parole if it finds that the person violated a condition of the parole. The Board of review shall review the person's status prior to the expiration of the parole period, and may extend the parole.

[17] In this context, parole must be read as meaning "released from custody."

consent requirement was excised. By complying with the court order, the petitioner, at the very least, acquiesced. Its acquiescence was underscored and made manifest when it thereafter, as we noted earlier, utterly failed timely to challenge that order on appeal. The issue of the respondent's parole eligibility, therefore, is not now before this Court.

III.

Noting that "[i]t was utterly at variance with concepts of due process of law and basic fairness to charge appellant with a violation of a condition of parole when he was never on parole and had never been apprised of what the conditions of his parole would be," slip op. at 6, the Court of Special Appeals held that the respondent's parole was improperly revoked: the "appellant was entitled to know the

conditions of his parole in order that he be able to protect his liberty interest in remaining free, once he was actually released." Slip op. at 8.

As a matter of constitutional law, a parolee reasonably may be expected to follow only such conditions of parole of which he or she is made aware. Cohen & Gobert, supra, § 5.04 at 193. As we have seen, however, parole can be rescinded, as opposed to revoked, when the parolee engages in conduct which is not violative of a formal parole condition. The parolee's liberty cannot be forfeited as a result of that conduct "unless he [or she] is given prior fair warning." U.S. v. Dane, 570 F.2d 840, 844 (9th Cir. 1978).

The Order of Parole and the parole agreement with which the respondent was served on August 8,

1990 required the respondent to "conform to all rules of conduct imposed by Patuxent Institution or an authorized representative." The Request For Parole Revocation Warrant, with which the respondent was also served, alleged that the respondent violated this precise condition. Nothing in the record indicates that, in 1987, when the Board recommended that he be paroled, that the respondent was apprised of the conditions with which he would have to comply or was given a parole agreement listing them. So far as this record reveals, the respondent was first notified of the conditions of his parole at the same time that he was informed that he violated one of them.

Because the conduct on the basis of which the revocation was premised was not criminal - the petitioner has conceded that the respondent has not

violated any federal or state law or municipal ordinance - and did not constitute an institutional infraction, i.e., it was not the institutional equivalent of criminal conduct, we hold that the respondent's parole was improperly revoked, he not having been notified, in advance, of the condition allegedly violated. Both common sense and due process demands this result. See Swan v. State, 200 Md. 420, 425, 90 A.2d 690, 693 (1952) (whether a condition of probation has been violated depends upon the terms of the suspension, which were made known to the probationer, and by which he was to be guided in this conduct). See also Benboe v. State, 730 P.2d 356 (Alaska App. 1987). In that case the court reversed a probation revocation for failure of the defendant to participate in sex therapy while imprisoned, where the order was not a condition

of probation and covered a period prior to the commencement of probation because, the court opined, the order "served no clear notice upon [the defendant] that the probationary status of his sentence hinged on his compliance with it." Id. at 360.

In the instant case, as in Benboe, the respondent's parole agreement did not contain any condition that he attend therapy, nor was the respondent made aware that his progress or, more accurately, Dr. Farrell's perception of his progress, in therapy was an actual condition of parole which, if violated, would result in loss of liberty.[18]

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[18] In Smith v. State, 306 Md. 1, 7, 506 A.2d 1165, 1168 (1986), we made clear that the conditions may not be vague, indefinite, or uncertain. There, the trial court revoked the defendant's probation for his alleged failure to comply with the condition that he undergo drug screening. We reversed. We stated, however, that a general condition may be reasonable and effective if the probationer were provided with directions defining the specific conduct

Additionally, the violation of the requirement to attend and participate in therapy is not a violation of a criminal law, which all parolees and probationers are aware is a ground for parolee/probation revocation. See Dane, 570 F.2d at 844 (knowledge of the criminal law is imputed to parole/probationer as an understanding that violation of the law will lead to

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required for compliance. Id. at 10, 506 A.2d at 1170. Thus, "[a] general condition of probation is permissible only 'so long as it is contemplated that the court or its designee (usually the probation authority) will provide the probationer with reasonable, specific direction within the ambit of the initially expressed general condition, and such guidance is in fact given.' " Id. at 7, 506 A.2d at 1168 (citation omitted). See also Hudgins v. State, 292 Md. 342, 347, 348 A.2d 928, 930-31 (1982) (requirement that the probation, as a "special condition", "cooperate with the Maryland State police in tracking down criminals" was acceptable provided the probationer received specific directions as to what the condition entailed).

The Court of Special Appeals, alternatively, characterized the conditions with which the respondent allegedly failed to comply as vague, indefinite and uncertain. Given the view we take of this case, we need not and, therefore, do not reach that issue.

revocation of parole/probation).

To be sure, the requirement that the respondent conform his conduct to the Board's rules and regulations is an appropriate condition of parole because it bears a direct relationship to its purpose. Where conduct failing to conform to that requirement occurs after a favorable parole decision has been made, but before it has been effectuated, it may very well be appropriate to rescind the parole on the basis of that conduct. See Cohen & Gobert, § 4.04 at 165-66. A different rule necessarily applies after the decision has been effectuated. In the former case, due process may not require a hearing since the potential parolee will only have an expectation of liberty. See Morrissey, 408 U.S. at 482 n.8, 92 S.Ct. at 2601 n.8, 33 L.E.2d at 495 n.8. In the latter, a hearing will be required

because the liberty interest would have been acquired by virtue of the grant of parole. See Id. at 482, 92 S.Ct. at 2601, 33 L.E.2d at 495.

IV.

Finally, the petitioner argues that it has no authority to parole the respondent because, as of April 1990, he was neither an "eligible person" pursuant to the Patuxent Institution statute nor an inmate at the Institution. Furthermore, it points out, the respondent's parole expired on August 2, 1991, thus mooting the issue.

It continues to be significant that the petitioner did not appeal the circuit court order directing it to parole the respondent. Its authority to parole one who was not an "eligible person" pursuant to the Patuxent Institution statute or even an inmate at the institution

was certainly a proper issue for appellate review and, indeed, may have been a complete defense to the respondent's challenge. Instead of appealing, however, the petitioner proceeded as if it were authorized to parole the respondent. Although he was not an inmate at Patuxent at the time, it obtained his presence, served the necessary parole papers on him and only then proceeded with revocation proceedings. Subsequently answering the respondent's Petition for Reversal of Administrative Agency Action, the petitioner admitted that it paroled the respondent, it did not contend, then, as it does now, that it was not authorized to do so. The petitioner's conduct, in short, was, and is, inconsistent with one lacking authority. Only when this matter reached this Court did the petitioner argue that it lacked authority to have done what it did. The

petitioner cannot now be heard to say that it could not parole the respondent because he was not an "eligible person" or that the issue is now moot. See Burroughs v. Garner, 43 Md. App. 302, 405 A.2d 301 (1979) (Doctrine of equitable estoppel operates to prevent party from asserting rights if it would be inequitable and unconscionable to assert such rights).

V.

The Court of Special Appeals ordered the respondent's release pursuant to the 1987 Review Board parole recommendation. That was not, as we have said, anything more than a recommendation of parole. The August 8, 1990 Order of Parole, however, effectuated the respondent's parole and contained the required notification of its terms and conditions. Release should be in accordance with that

Order.

More than two years have passed since the respondent's parole. We have previously acknowledged that parole may be rescinded even before its physical service has begun, if the parolee has violated the law, see Matthews, 304 Md. at 291, 498 A.2d at 660, or its institutional equivalent, that is, for misconduct which makes it apparent that the parolee is presently unworthy of parole. Thus, before the respondent is released, the Board is entitled to conduct an investigation of the institutional records to determine whether the respondent has engaged in such misconduct. An allegation that the respondent has engaged in such misconduct, because he has already been paroled, must be tested by a prompt hearing. See Morrissey, 408 U.S. at 484, 92 S.Ct. at 2602, 33

L.Ed.2d at 496.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED, EXCEPT THAT THE RESPONDENT SHALL BE RELEASED PURSUANT TO THE TERMS OF THE AUGUST 8, 1990 ORDER OF PAROLE.

COSTS TO BE PAID BY THE PETITIONER.

IN THE COURT OF APPEALS OF MARYLAND

No. 5

September Term, 1992

PATUXENT INSTITUTION BOARD OF REVIEW

v.

CLARENCE J. HANCOCK

Murphy, C.J.
Eldridge
Rodowsky
McAuliffe
Chasanow
Karwacki
Bell

JJ.

Dissenting opinion by
McAuliffe, J. in which Murphy, C.J.
and Karwacki, J. join.

Filed: March 12, 1993

McAuliffe, J., dissenting.

The Court is correct in identifying procedural faults growing out of Patuxent's attempts to follow an ambiguous order issued by a trial judge in 1990. Because the procedure employed subsequent to the trial judge's order diverted the attention of all parties from the basic question which must be addressed -- a question that was adequately identified by the trial judge's order -- Hancock is entitled to a new hearing at which the Patuxent Institution Board of Review (the Board) is entitled to show that Hancock's conduct subsequent to the initial recommendation of parole justifies rescinding or refusing parole.

In January 1977, Hancock was sent to the jurisdiction of the Division of Corrections for life plus 35 years for the murder of a woman and for

committing an assault with intent to murder on the woman's 11-year-old son. In April of 1977 Hancock was found to be a "defective delinquent" and was accepted at Patuxent Institution. In September, 1977, after the law governing eligibility for acceptance at Patuxent changed, Hancock was found to be an "eligible person," and remained at Patuxent.

On 19 November 1987 the Board recommended to the Governor of Maryland that Hancock be granted parole. On 13 July 1988, the governor rejected that recommendation. On 1 December 1988, Hancock was removed from work release when that program was suspended for all inmates. In November, 1989, the Board was advised of "problems" with Hancock because of alleged deterioration of performance, and on 15 March 1990, the Board revoked Hancock's work

release status. On 5 April 1990, the Board determined that Hancock was no longer an eligible person, and ordered his release from Patuxent and transfer to the Division of Corrections.

On 7 June 1990, this Court decided that the statutory requirement of gubernatorial approval for parole from Patuxent, which had been added by Chapter 588 of the Acts of 1982, could not constitutionally apply to persons incarcerated for crimes committed prior to the passage of that act. Gluckstern v. Sutton, 319 Md. 634, 672, 574 A.2d 898, cert. denied, 111 S.Ct. 369 (1990). On 24 July 1990, Judge John Carroll Byrnes entered an order in a Habeas Corpus case earlier brought by Hancock, holding that the granting of parole to Hancock was no subject to gubernatorial approval and directing further

proceedings in accordance with Hancock's claimed right to parole.

On 8 August 1990, purporting to act in accordance with Judge Byrnes' order of 24 July, Patuxent issued an "Order of Parole" for Hancock. On the same day, Dr. John Farrell, a psychologist at Patuxent, filed a request for a parole revocation warrant; a preliminary hearing was held; and Hancock was "removed" from parole pending a full hearing. On 6 September, the Board held a hearing and ordered Hancock's parole revoked. Hancock's appeal from that decision is now before the Court.

Matters began to go awry in this case when Judge Byrnes entered the order of 24 July 1990. Judge Byrnes was entirely correct in holding that Gluckstern v. Sutton, supra, applied to Hancock's case because

Hancock's criminal activity occurred before passage of Ch. 588 of the Acts of 1982. Although Hancock may have been entitled to no more than a new parole hearing unfettered by the necessity for gubernatorial approval, I cannot fault Judge Byrnes' decision to give Hancock the benefit of the Board's previous approval of parole, and to place upon those who would resist parole the burden of showing circumstances that occurred subsequent to the initial decision which would persuade the Board that parole at the present time would be inappropriate. Judge Byrnes said in his order:

> The Court is mindful of the fact that the petitioner may have engaged in conduct since the initial parole decision by the Board of Review that would militate against his release on parole at this time.

Had Judge Byrnes left it at that, an appropriate hearing

would have been held and, I am satisfied, Hancock would have been denied parole because: 1) as a matter of law he was no longer eligible for parole from Patuxent; and 2) his conduct subsequent to 19 November 1987 demonstrated that he posed a danger to society.

Unfortunately, Judge Byrnes directed the use of a particular procedure to test whether Hancock should be released on parole. He ordered the Board to view the matter as if Hancock had been on parole since the entry of the Board's original recommendation in 1987, and to release him or parole unless it issued a parole revocation retake warrant on or before 10 August 1990, alleging "conduct since the initial parole decision . . . that would militate against his release on parole at this time." Judge Byrnes recognized that utilizing this

hypothetical framework posed certain problems because Hancock had in fact been in custody and was therefore unable to conform to certain standard conditions of parole, such as maintaining a job and reporting to a parole officer. He made it clear, therefore, that the Board "should focus on behavior over which petitioner has exercised control." As an example, he said, proof of Hancock's violation of one of Patuxent's major disciplinary rules would suffice. The judge's order did not consistently differentiate between hypothesis and reality, however, and in a single sentence the Board was directed "to parole [Hancock] on or before August 10, 1990, unless [the Board] within that time period commences appropriate and legally mandated procedures to revoke petitioner's parole . . . ."

Both parties attempted to comply with Judge Byrnes' order but from a reading of the transcript it is obvious that form got in the way of substance. Patuxent offered legally sufficient evidence to show that as a result of Hancock's voluntary conduct subsequent to the earlier recommendation for parole, he was no longer eligible for parole because he no longer qualified as an eligible person and had been transferred to the Division of Corrections, and because he would pose a danger to the community if released on parole. Yet, the Court of Special Appeals reversed the Board's refusal to release Hancock on parole on the grounds that Hancock had not been shown to have violated any specific condition of parole of which he had been made aware.

If the parties had concentrated on the substance

of Judge Byrnes' order, it would have been clear that intervening conduct by Hancock which disqualified him from parole was to be considered, as well as conduct that violated specific conditions of parole which hypothetically would have been imposed.

In Matthews v. State, 304 Md. 281, 292, 498 A.2d 655 (1985), this Court held that

> a trial court has the authority to revoke probation for criminal acts committed after the imposition of sentence but before service of probation based on a condition implicit in the grant of probation that the defendant obey all laws. (Footnote omitted.)

The requirement that a defendant obey all laws is not the only condition implicit in a grant of probation or parole. Equally implicit in the grant of parole from Patuxent Institution would be the conditions that the inmate remain legally eligible for parole status, and that parole of the inmate "will not impose an

unreasonable risk on society . . . ." Maryland Code (1957, 1990 Repl. Vol.) Art. 31B, § 11(b)(2). These are conditions "so basic and fundamental that any reasonable person would be aware of such condition[s]." Matthews v. State, supra, 304 Md. at 291 (quoting Brooks v. State, 484 P.2d 1333, 1334 (Okl. Cr. App. 1971)).

In the instant case two absolutely unequivocal conditions to the grant of parole existed by virtue of statute; there was no need to set them forth in a parole order, because without those conditions being met there could be no parole order. Those conditions, established by Art. 31B, § 11(b) were that: 1) the person to be paroled is an eligible person confined at Patuxent Institution; and 2) the parole of that person "will not impose an unreasonable risk on society."

Article 31B, § 11(b)(2). The "Request for Parole Revocation Warrant" alleged that Hancock's conduct had resulted in an earlier finding by the Board that Hancock was no longer an eligible person, and because of his conduct he "is seen as posing a threat to the safety of the community . . . ." The evidence of record is sufficient to support both allegations.

Dr. John Farrell testified in opposition to the proposed parole. He conducted therapy for Hancock's group, both before and after Hancock was on work release. In order to understand some of the concerns expressed by Dr. Farrell, it is necessary to know something of the nature of the offense for which Hancock was convicted.

On 29 February 1976 Hancock broke into the victim's apartment when she was temporarily absent,

intending to bind her three children and then sexually assault her when she returned. The victim returned after Hancock had bound one of the children. He then bound and gagged the victim and removed her clothing. The victim managed to remove the gag and began to scream. Hancock panicked, and with a hammer he found in the kitchen, beat the victim so badly that she later died. When the 11-year old child of the victim attempted to come to the aid of his mother, Hancock struck the child 27 or 28 times, inflicting massive permanent brain damage.

Dr. Farrell was concerned about Hancock's failure to express remorse, particularly for what he had done to the child. Hancock apparently told Dr. Farrell in therapy that he had "backhanded" the child during the criminal incident. Dr. Farrell was also concerned

about Hancock's refusal to address the sexual aspect of his crime. Dr. Farrell said that in therapy Hancock insisted on presenting the offense as an impulsive act, arising from anger he felt because the victim had spoken sharply to him, and not involving a sexual component. The psychologist noted that Hancock had brought tape and cord from his home to the victim's apartment, which indicated prior cognitive activity and probable sexual fantasizing. He also noted that when Hancock had been examined at Clifton T. Perkins Hospital, the doctors found "indications of sexual sadism." Dr. Farrell felt that Hancock's refusal to come to grips with the true facts of the crime, and with his motive to commit it, precluded successful therapeutic treatment. For this and other reasons, he also concluded that Hancock constituted "a threat to

public safety." Moreover, he testified that an independent psychological examination of Hancock had been conducted subsequent to his removal from work release, and the examining psychologist found Hancock to be dangerous at that time.

The Court, although agreeing with the Court of Special Appeals that Hancock should not be denied parole for failure to conform to a rule of which he had no adequate notice, recognizes that "parole may be rescinded even before its physical service has begun, if the parolee has violated the law . . . or . . . for misconduct which makes it apparent that the parolee is presently unworthy of parole." Court's opinion at ____ [slip op. at 39-40]. The Court also correctly concludes that "[a]n allegation that the respondent has engaged in such misconduct, because he has already

been paroled, must be tested by a prompt hearing." Id. at ___ [slip op. at 40]. My concern is that the Court may be viewing "misconduct" too narrowly.

The Court suggests that "misconduct which makes it apparent that the parolee is presently unworthy of parole" must be determined only from "a review of the institutional records to determine whether the respondent has engaged in such misconduct." Id. at ___ [slip op. at 39-40]. In so doing, the Court may be suggesting that only recorded infractions may properly be considered. For reasons I have pointed out, conduct short of an infraction, whether labeled misconduct or not, which persuades the Board that Hancock's release will impose an unreasonable risk on society, will not only justify, but indeed compel, denial of parole. The same situation would be presented if,

for example, Hancock had disclosed in the course of therapy that he intended to kill the victim's son if he were released. This statement might not be considered "misconduct" or an "infraction," but it most certainly would indicate that the inmate should not be paroled. Any conduct on the part of the inmate subsequent to the initial recommendation of parole, and for that matter any newly discovered information coming to the attention of the Board subsequent to that time, which would indicate that Hancock is currently dangerous, must be considered.

Moreover, I disagree with the Court that at the hearing to be held the Board may not consider whether Hancock is an eligible person, and therefore eligible for parole. The Court reaches that conclusion on the basis of equitable estoppel, which I do not find

applicable. The Board was merely trying to follow the hypothetical framework established by Judge Byrnes' order of 24 July 1990. The real substance of that order was to determine whether Hancock had "engaged in conduct since the initial parole decision . . . that would militate against his release on parole at this time." If Hancock has engaged in conduct since the initial parole decision that has lawfully[1] caused him to lose his status as an eligible person, he not only should not be granted parole, he cannot be granted parole by

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[1] Hancock informs us that by two actions filed in the Circuit Court for Howard County he has challenged Patuxent Institution's determination that he is no longer an eligible person, on the ground that he was not afforded procedural due process in the course of that determination. Proceedings in those cases were stayed pending the outcome of this appeal. After remand, the stay should be lifted and those cases should be promptly resolved. If Hancock prevails in those cases, parole could not be denied on the basis that Hancock is no longer an eligible person; on the other hand, if the action of the Board is affirmed in those cases, Hancock's loss of status as an eligible person should bar his release on parole.

the Board. Article 31(b), § 11(b). That is a matter the Board must be permitted to consider, and the consideration of such an issue is consistent with Judge Byrnes' order.

When this case is remanded, the notice give Hancock should be amended to include the allegations of violation of the implicit, and statutorily required, conditions I have discussed, and these matters should be considered at the new hearing.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

NO. 1144

September Term, 1991

CLARENCE J. HANCOCK

v.

PATUXENT INSTITUTION BOARD OF REVIEW

Bloom,
Wenner,
Harrell,

JJ.

Per Curiam

Filed: February 18, 1992

In February 1976, appellant, Clarence Hancock, was sentenced to a term of life imprisonment plus 35 years following his convictions for murder, attempted murder, and assault and battery. In 1977 he was accepted at Patuxent Institution as a defective delinquent and subsequently retained as an "eligible person,"[1] thus becoming eligible for parole, regardless of the length of sentence, when and only when the Patuxent Institutional Board of Review determined that parole would benefit both society and appellant. Appellant was approved for parole by the Board of Review on 19 November 1987. Pursuant to Md. Ann. Code Art. 31B, § 11(b)(2) (1986 Repl. Vol.), which went into effect 1 July 1982, the Governor's approval

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[1] As defined in Md. Code Art. 31B, § 1(f)(1) (1983 Repl. Vol.). See also Md. Code Art. 31B, § 1(f)(1) (1990 Repl. Vol.).

was necessary before parole became final. The Review Board sent a letter to the Governor recommending appellant for parole. The Governor denied parole. On 7 June 1990, the Court of Appeals held that the retroactive application of the gubernatorial approval requirement to Patuxent inmates serving life sentences for offenses committed before the effective date of law, 1 July 1982, was a violation of the ex post facto clauses of Article 1, § 10, clause 1, of the United States Constitution, and Article XVII of the Maryland Declaration of Rights. Gluckstern v. Sutton, 319 Md. 634, 664-72, cert. denied, ___ U.S. ___, 111 S.Ct. 369, 112 L. Ed. 2d 331 (1990).

On 24 July 1990, the Circuit Court for Baltimore City issued a Memorandum and Order in a habeas corpus proceeding brought by appellant.

Applying the Gluckstern decision, the court accorded appellant the rights and privileges of a parolee. The court order also stated that:

> The Court is mindful of the fact that the petitioner may have engaged in conduct since the initial parole decision by the Board of Review that would militate against his release on parole at this time. Consequently, the Patuxent Board of Review is entitled to review petitioner's conduct since the parole recommendation to determine whether he "has in fact breached the conditions of parole." Morrissey v. Brewer, 408 U.S. 471, 483-484 (1972).

Furthermore, the court order stated that "[u]nless a parole revocation retake warrant has been issued, parole to the community can be postponed beyond August 10, 1990 only if petitioner has not submitted reasonable home and employment plans." There was no appeal from the decision of the Baltimore City Circuit Court.

Pursuant to the July 24 court order, the Patuxent Board of Review issued an order of Parole on 8 August 1990. Appellant, however, was not released on parole because, on the same day, 8 August 1990, appellee served appellant with a retake warrant and notice of intent to revoke parole. The notice alleged that appellant violated General Condition No. 3 of his order of parole.[2] The notice did not specify what law, ordinance, or rule appellant violated. Also on the same day, 8 August 1990, a preliminary revocation hearing was conducted. The hearing officer found that probable cause existed to detain appellant for violation

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[2] General Condition No. 3 states:

> The parolee shall not commit any act which would be a violation of any Federal, State Law or Municipal ordinance; and shall conform to all rules of conduct imposed upon him by the Patuxent Institution or an authorized representative.

of General Condition No. 3 pending a formal revocation hearing.

A formal revocation of parole hearing was conducted at Patuxent on 6 September 1990. After taking testimony and hearing argument the Board revoked appellant's parole. Specifically, the Board found that appellant failed to participate actively in his therapy, particularly when asked to discuss the motivation for his crime.

Appellant appealed the Board's decision to the Circuit Court for Howard County, pursuant to the Administrative Procedure Act, Md. State Gov't Code Ann., § 10-215 (1984). After submission of legal memoranda and oral argument, the Circuit Court for Howard County (Sybert, J.) affirmed the decision of the Patuxent Institution Board of Review. In so

finding the court stated:

> In arriving at its decision, this Court has also reviewed the transcript of the Board of Review as well as the conditions of parole and has decided that none of the basis set-forth in Section 10-215(g)(3) for a reversal or modification of the Board's decision have been found.

Appellant filed this timely appeal and argues that the Board's revocation of appellant's parole was unlawful.

Precisely, appellant argues:

1. When there is no parole condition requiring attendance in therapy, does the revocation of appellant's parole for alleged failings in therapy violate constitutional due process?

2. Can a therapist impose oral conditions regarding therapy when there is no written condition requiring appellant to attend therapy?

3. It is unconstitutionally vague and over-broad to apply a general parole condition requiring obedience to all laws and rules of conduct to alleged failings in therapy?

4. Is a revocation of parole, predicated on alleged failings in therapy, unconstitutional when there is no evidence that such failings were willful?

5. Is there a lack of substantial and material evidence in the record to support the Board's conclusion that appellant did not obey his therapist's instructions?

We agree with appellant that revoking his parole, based on conditions that appellant was not made aware of until the moment his parole was revoked, is a violation of appellant's due process rights under Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

The due process clauses of Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution are

identical in meaning. Vavasori v. Commissioner On Human Relations, 65 Md. App. 237, 243 cert. denied, 305 Md. 419 (1985). The Court of Appeals has held that "Supreme Court interpretations of the federal provision are authority for interpretation of Article 24." Id., quoting Department of Transportation v. Armacost, 299 Md. 392, 415-16 (1984).

Appellant must first establish that he has been deprived of a property interest in order for him to establish a violation of procedural due process. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974). Whether a parolee's liberty is defined in terms of a right or a privilege, "[b]y whatever name, the liberty is valuable and must be seen as within the protections of the Fourteenth Amendment." Morrissey v. Brewer, 408

U.S. 471, 482, 92 S.Ct. 2593, 2601, 33 L.Ed.2d 484 (1972). (Emphasis added).

The Supreme Court has stated that it perceives no relevant difference to the guarantee of due process between the revocation of parole and the revocation of probation. Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Procedural due process guarantees a parolee the right to continue on parole absent any violation of his parole conditions. Herald v. State, 52 Md. App. 295, 301 (1982). Generally, in a revocation of parole (or probation) case, a two-step analysis is applied by the reviewing court. The Supreme Court enunciated the analysis in Morrissey:

> Implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his

> parole. The first step in a revocation decision thus involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parolee. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee he recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation?

408 U.S. 471, 479-80, 92 S.Ct. 2593, 2599, 33 L.Ed.2d 484, 493 (1972).

The actions of the Review Board at Patuxent prevent us from even considering the first step. Appellant was never apprised of the conditions of his "short-lived" parole. The Gluckstern decision eliminated the gubernatorial approval requirement for Patuxent inmates serving life sentences for offenses committed before 1 July 1982. Appellant falls into this class of Patuxent inmates. It was utterly at variance

with concepts of due process of law and basic fairness to charge appellant with a violation of a condition of parole when he was never on parole and had never been apprised of what the conditions of his parole would be. Perhaps Patuxent's proceedings would have been more colorable if appellant had violated some state or federal law. Such is not the case. At the revocation hearing, Patuxent personnel testified that appellant had not broken any law or violated any institutional disciplinary rule. It is alleged that appellant violated the last directive of General Condition Number 3, by failing to "conform to all rules of conduct imposed upon him by the Patuxent Institution or an authorized representative." Even if appellant had been aware of this condition the result here would be the same. "To be enforceable a

condition of probation [or parole] must not be vague, indefinite or uncertain." Smith v. State, 306 Md. 1, 7 (1986). This alleged "condition" does not pass muster; it is vague, uncertain, and indefinite. Moreover, whether appellant willfully violated it by failing to participate in therapy to the satisfaction of the therapist was a determination dependent entirely upon the subject evaluation (or arbitrary whim) of the therapist.

The Board of Review erroneously relied on the Baltimore City Circuit Court Order which stated that "the Patuxent Board of Review is entitled to review petitioner's conduct since the parole recommendation to determine whether he has in fact breached the conditions of parole." Morrissey v. Brewer, 408 U.S. 471, 483-484 [sic] (1972)." Patuxent points out that this order was not appealed from and the propriety of

the above-quoted statement is not before this Court. What is before this Court is the decision of the Circuit Court for Howard County affirming the decision of the Patuxent Institution Board of Review's revocation of appellant's parole. As to the decision affirmed by the Circuit Court for Howard County and thus before us on this appeal, the Board of Review violated appellant's right to due process of law by revoking his parole based on what it claims to be a violation of a condition of his parole of which he had never been given notice. The Circuit Court for Baltimore City could not authorize the Board of Review to do that; and its ruling cannot be construed as authorizing the Board of Review to deny appellant due process of law. The most onerous interpretation of the ruling of the Circuit Court for Baltimore City in the habeas corpus

proceeding is that appellant's parole could be revoked before he was released if he had violated some law or engaged in conduct that any parolee may be presumed to know would be a parole violation. Appellant had no reason to appeal that ruling.

In summary, appellant was entitled to know the conditions of his parole in order that he be able to protect his liberty interest in remaining free, once he was actually released. "[W]hen notice is a person's due, process which is a mere gesture is not due process." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

We reverse the decision of the Circuit Court for Howard County, and remand the case to that county for the passage of an appropriate order that will direct

appellant's immediate release from incarceration, pursuant to the terms of the 19 November 1987 Review Board decision. Since appellant has been confined contrary to law since the date of that decision, our mandate will issue forthwith.

JUDGMENT REVERSED.

COSTS TO BE PAID BY APPELLEE
MANDATE TO ISSUE FORTHWITH.

CLARENCE J. HANCOCK	*	IN THE
Appellant	*	CIRCUIT COURT
vs.	*	FOR
PATUXENT INSTITUTION	*	HOWARD
BOARD OF REVIEW	*	COUNTY
Appellee	*	Case No. 90-CA-14372

* * * * * * * * * *

ORDER

Before this Court is an appeal from the September 6, 1990 Patuxent Board of Review decision to revoke Clarence Hancock's parole from the Patuxent Institution.

Mr. Hancock was given a preliminary parole revocation hearing and later a formal revocation hearing at which hearing he had the assistance of Counsel.

This Court, after hearing oral argument by Counsel, after reading Counsel's memoranda, after considering the Administrative Procedure Act of Maryland and the scope of review of such an appeal and the burdens upon both the Appellant as well as the Appellee, is of the opinion that the decision of the Patuxent Institution Board of Review should be affirmed.

In arriving at its decision, this Court has also reviewed the transcript of the Board of Review as well as the conditions of parole and has decided that none of the basis set-forth in Section 10-215(g)(3) for a reversal or modification of the Board's decision have been found.

Therefore, it is, this 3rd day of July, 1991, by the Circuit Court for Howard County, Maryland,

ORDERED, that the decision of the Patuxent Institution Board of Review's revoking the parole of the Appellant, Clarence J. Hancock, be and the same is hereby affirmed.

/s/
Cornelius F. Sybert, Jr.
JUDGE

cc: Witold J. Walczak, Esquire
Emory A. Plitt, Jr., Esquire

Copies Mailed: JUL 03 1991

PATUXENT INSTITUTION
INSTITUTIONAL BOARD OF REVIEW
DECISION

IN THE MATTER OF CLARENCE HANCOCK #3310

Hearing Date: September 6, 1990

Attorney for Parolee: Witold Walczak, Legal Aid

Attorney for Institution: Charles L. Fuller, Administrator

Board Members Present: Henneberry, Steffens, Henley, Sedgewick, Brown, Richards, Kludt (Marshall removed self)

VIOLATION ALLEGED:

General Condition #3 — The parolee shall not commit any act which would be a violation of any Federal, State Law or Municipal ordinance; and shall conform to all rules of conduct imposed upon him by the Patuxent Institution or an

authorized representative.

DISCUSSION

This case comes before the Board due to a successful court challenge made by the Parolee. The Court held that the Parolee, who is serving a life sentence, had been sentenced before the law was changed. At the time of the Parolee's admission to the Patuxent program the Board of Review had the sole authority to grant parole. The subsequent change in the law requiring the governor's approval was held to be an ex post facto law as it applies to the parolee. Therefore, the parolee should have been released on parole. Since he was not actually placed on parole the court held that he should be treated as if he had been on parole, and his conduct since the time of the approval of parole should be considered in any revocation proceeding.

The Parolee's former therapist Dr. John P. Farrell testified that he has been working with the Parolee for several years. During that time he has reviewed various treatment plans with the parolee and discussed his progress. The Parolee was approved for Parole on November 19, 1987 by the Board of Review, pending approval of the Governor. In July 1988 the recommendation was denied by the Governor.

On November 3, 1988 Mr. Hancock was approved to continue on Work Release. On December 1, 1988 the entire work release program was suspended. After the suspension of the Work Release Program Mr. Hancock's participation began to decline.

In November 1989 it was noted that Mr. Hancock failed to continue seriously addressing the motivation of his crime, which is critical to his successful rehabilitation. Mr. Hancock was cautioned on an number of occasions regarding the importance of his being open and earnestly seeking to address the nature of his crime. Mr. Hancock failed to satisfactorily participate in therapy. He became vague, evasive and spoke in general terms during therapy. Mr. Hancock's participation in the therapeutic program seriously declined to the point where he was brought before the IBOR and subsequently found to be no longer an Eligible Person.

In determining Mr. Hancock's status as a non Eligible Person, the IBOR found that, despite numerous directives regarding his conduct, Mr. Hancock continued to respond unfavorably to the programs and services of the Patuxent Institution.

Dr. Farrell emphasized that, due to the nature of Patuxent Institution being a therapeutic rehabilitative facility, it is crucial that the inmates seriously look into their inner self to assist in their rehabilitation. Failure to do this impairs the inmates rehabilitation.

Treatment plans detailing specific areas of concern were written for and reviewed by Mr. Hancock. These plans also contained the rules of conduct by which he was required to comply. Mr. Hancock failed to continue his therapeutic progress as delineated in his treatment plans.

Mr. Hancock maintains that he has not violated any rule or regulation. He has never received a

"ticket" for a disciplinary infraction. Furthermore, he has availed himself of the educational programs offered. In addition he has done as his therapist have instructed.

As witnesses, Mr. Hancock produced his wife Mrs. Elisa Hancock and his pastor Mr. Ralph Dennis. Mrs. Hancock is a clinical social worker. Mr. Dennis has counselled Mr. Hancock for the past two years. Both witnesses testified that in the last two years neither has noticed any change in Mr. Hancock. They feel he has always been a stable and model person.

FINDINGS OF FACT

1. Mr. Clarence Hancock was initially approved for parole on November 19, 1987.

2. In July 1988 the Governor denied the recommendation for parole.

3. Mr. Hancock was continued on the Work Release Program.

4. The Work Release Program was suspended in December 1988.

5. Thereafter, Mr. Hancock's participation in the therapeutic program seriously declined to the point where he was brought before the IBOR and subsequently found to be no longer an Eligible Person.

6. By Order of Court, Mr. Hancock's parole agreement was reinstated on August 2, 1990.

CONCLUSIONS OF LAW

Article 31B provides in pertinent part that:

> Section 11 (b) Action by board of review prior to expiration of sentence. -- After the transfer of a person to the Institution for treatment as an eligible person but prior to the expiration of the person's sentence, the board of review, upon review of the person may take the following action:
>
> (2) If the board of review concludes that (i) it will not impose an unreasonable risk on society; and (ii) it will assist in the treatment and rehabilitation of the eligible person, it may grant a parole from the Institution for a period not exceeding one year.
>
> (6) The board of review may attach reasonable conditions to the parole, at any time make reasonable and appropriate modifications of the conditions, and revoke the parolee if it finds that the person has violated a condition of the parole . . . [emphasis added]

After careful consideration of the testimony in the matter, the board finds that Mr. Hancock has failed to comply with the instructions and directives of his therapist, he has thwarted the purpose and mission of the Institution. He is, therefore, in violation of the

terms and conditions of his parole.

ORDER

IT, THEREFORE, IS ORDERED that Mr. Clarence Hancock's parole be revoked.

James Kludt, M.D. (for)
Henry Jay Richards, Ph.D
Executive Secretary

Distribution:
Parolee
Witold Walczak
Charles L. Fuller
Base File

STATE OF MARYLAND
PATUXENT INSTITUTION
ORDER OF PAROLE

The Institutional Board of Review, by virtue of the authority conferred upon it by the laws of the State of Maryland, does hereby grant Parole, for a period of one year, to:

NAME: CLARENCE HANCOCK #3310

who was convicted of: 1) Murder, First Degree; 2) Assault with Intent to Murder; 3) Assault and Battery and has a total sentence of Life plus thirty-five (35) years dating from February 29, 1976

in the Prince George's County Circuit Court on December 9, 1976 and was committed to Patuxent Institution as an Eligible Person on September 30, 1977

As witness the signature of the Director of Patuxent Institution and the Seal of Patuxent Institution hereto affixed; attested by an administrative officer of said Institution.

August 2, 1990
Original Parole Date

August 2, 1991
Parole Expiration Date

Attested: /s/ /s/
Director, Patuxent Institution

See attached for Terms and Conditions of Parole
General Terms and Conditions of Parole appear on the reverse side of this form. Special Conditions of Parole: 1) Must reside in REF until otherwise directed by Board of Review or Director of Institution. 2) Must abstain from drinking alcoholic beverages and from using illicit drugs and may be required to undergo tests for these substances at any time. 3) Must abstain from any contact with Ms. Theresa Knight and son Andrew Knight. 4) Must attend weekly supervision as directed by Unit V.
PAROLEE'S ACCEPTANCE OF PAROLE: I, Clarence Hancock, have read, or have had read to me, the terms and conditions of parole. I fully understand them and hereby accept this parole and agree to comply with all the terms and conditions of parole.

Further, in consideration of the granting to me of this parole I hereby waive extradition to the State of Maryland and expressly agree that I will not contest any effort to return me to the State of Maryland in consequence of my violating any of the terms and conditions set forth herein or for any other cause resulting in issuance of a Warrant for my return. I hereby acknowledge receipt of a copy of this ORDER for Parole.

/s/	/s/	8/8/90
Witness	Signature of Parolee	Date

Upon being paroled and released from the confines of the Patuxent Institution, the parolee shall remain in legal custody of the Institution during the period of this parole. The expiration date appearing on this form represents the end of the period of parole granted, and does not represent the end of the period of confinement and treatment. The Board of Review has the authority to return the paroled inmate to the Institution if the paroled inmate's progress in the community is considered to pose a risk to public safety or pose a risk to the paroled inmate. Upon violation of any of the terms and conditions of this parole, the parolee will be returned to the Patuxent Institution where a hearing will be conducted by the Institutional Board of Review. If this parole is revoked, the inmate will continue to serve his/her sentence within the confines of the Institution.

TERMS AND CONDITIONS OF PAROLE

1. The parolee shall not go outside the limits of the State of Maryland without the written permission of the Institutional Board of Review.

2. The parolee shall promptly report to the Patuxent Institution or wherever and whenever an authorized representative may direct.

3. The parolee shall not commit any act which would be a violation of any Federal, State Law or Municipal ordinance; and shall conform to all rules of conduct imposed upon him by the Patuxent Institution or an authorized representative.

4. The parolee shall make reasonable effort to keep himself gainfully employed or otherwise occupied, as directed by the Institutional Board of Review.

5. The parolee shall not change his place of residence or employment without first having obtained the permission of the Patuxent Institution or an authorized representative thereof.

6. The parolee shall not own, possess, use, sell, or have under his control any firearm or weapon of any description, including any device when resembles and is used as a weapon.

7. The parolee shall not enter into any contract to engage in business, shall not borrow money, enter into any installment contract, incur any debt nor acquire ownership of any motor vehicle without first having obtained the permission of the Institutional Board of Review.

8. The parolee shall not unlawfully possess, use, buy, sell, or have under his control any narcotic drug, "controlled dangerous substance", or related paraphernalia.

9. A parolee, when seen, shall present proof that the parolee is maintaining steady employment, attending substance abuse meetings if appropriate, and living at a specified address. This information will be verified and documented.

10. A parolee shall give a random urine specimen as required by the parolee's supervisor.

11. A parolee shall discuss the problems or the progress that the parolee is having in the community and the types of relationships that the parolee may be establishing.

12. A parolee may be subject to a search for contraband during the parolee's visit by the parole supervisor.

13. Periodic job checks and home checks shall be made by the parole supervisor.

14. A parolee functioning on Interstate Compact or paroled to meet a detainer shall be monitored at least yearly by a designated employee of the Institution.

15. A parolee shall be employed or enrolled in school, and have a legitimate means of financial support. If unemployed or unemployable, the parolee shall have a legitimate means of financial support while on parole.

16. When paroled, an inmate shall receive all current funds in the inmate's active and reserve accounts, which have been maintained at Patuxent Institution. If paroled from work release, the inmate shall receive 100 percent of their work release account upon being paroled, less the deductions specified in COMAR 12.12.07.09B.

17. A parolee shall be counseled concerning the benefits of establishing savings accounts at financial institutions in the community.

18. A parolee who needs financial assistance shall be referred to appropriate community agencies and assisted in the application processes of the community agencies by a parole supervisor.

CLARENCE HANCOCK	*	IN THE
Petitioner	*	CIRCUIT COURT
v.	*	FOR
JOSEPH HENNEBERRY	*	BALTIMORE CITY
Respondent	*	Case No.: 90030905/H3825

* * * * *

MEMORANDUM AND ORDER

Having read and considered Petitioner's Motion in the above-captioned case, and having heard oral argument on the 18th of July, 1990, it is on this 24th day of July, 1990 ORDERED as follows:

1. The Order staying the granting of relief in the above-captioned Habeas Corpus action be, and hereby is, rescinded on the basis that the Maryland Court of Appeals has affirmed the judgment in the Circuit Court for Baltimore County in Gluckstern v.

Sutton, No. 107, September Term 1988, (June 7, 1990), denied the State's request for a stay of the mandate on June 29, 1990, and issued the mandate on July 9, 1990. Furthermore, the Supreme Court of the United States denied petitioner's request for a stay on July 9, 1990.

2. The Patuxent Board of Review approved the petitioner for parole but that recommendation has denied by the Governor. The Court of Appeals in Gluckstern v. Sutton, held that retroactive application of the gubernatorial approval requirement of Md. Ann. Code, Art. 31B, §11(b)(2) (1986 Repl. Vol., 1988 cumm. supp.) to a Patuxent lifer whose offense(s) were committed before 1982 violated the ex post facto clauses of the United States and Maryland Constitutions. Petitioner must, therefore, be treated as

a parolee, with all of the rights and privileges appertinent thereto. Morrissey v. Brewer, 408 U.S. 471 (1972). Petitioner must be paroled unless he " . . . has in fact acted in violation of one or more conditions of his parole [agreement]." Id. at 479.

3. The Court is mindful of the fact that the petitioner may have engaged in conduct since the initial parole decision by the Board of Review that would militate against his release on parole at this time. Consequently, the Patuxent Board of Review is entitled to review petitioner's conduct since the parole recommendation to determine whether he "has in fact breached the conditions of parole." Morrissey, 408 U.S. at 483-484.

4. Since petitioner has not been on parole physically, the Court recognizes that he may not have

satisfied many of the ordinary terms and conditions of a parole order, e.g. maintaining a job, reporting to a parole officer at specified times. However, these failing are not of his own volition. Therefore, in deciding whether revocation is warranted, the Board of Review should focus on behavior over which petitioner has exercised control. For example, if petitioner has committed a new offense or if he has violated a major disciplinary rule of the Institution, such transgressions would constitute the "verified facts", Morrissey, 408 U.S. at 484, upon which parole revocation might be considered.

5. Accordingly, the respondent be, and hereby is, directed to parole petitioner on or before August 10, 1990, unless respondent within that time period commences appropriate and legally mandated

procedures to revoke petitioner's parole, with a copy of the Request for Issuance of Retake Warrant form setting forth particularized grounds for the alleged violation to be served on petitioner, his counsel and this Court on or before August 10, 1990.

6. Unless a parole revocation retake warrant has been issued, parole to the community can be postponed beyond August 10, 1990 only if petitioner has not submitted reasonable home and employment plans. In the interim, the respondent is directed to take appropriate steps to assist petitioner with both. In the event that a living situation and job have not been secured by the 10th day of August, 1990, respondent is to parole petitioner to the half-way house in Baltimore, under appropriate supervision, wherein efforts to finalize both living and employment

situations will continue.

7. Finally, this Court makes clear that this Order does not insulate petitioner from possible future parole violations. Should petitioner from here on in ". . . commit acts that would constitute a violation of parole conditions," Morrissey, 408 U.S. at 485, Patuxent's authority to institute revocation proceedings and to protect the public safety is in no way abridged by this Order.

/s/
John Carroll Byrnes
Circuit Court Judge

No. 92-1933

Supreme Court, U.S.
FILED
AUG 6 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

PATUXENT INSTITUTION BOARD OF REVIEW,

Petitioner

v.

CLARENCE J. HANCOCK,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner has conceded and the Court of Appeals of Maryland has found that Clarence J. Hancock was paroled by the Patuxent Institution Board of Review on August 8, 1990. Immediately upon paroling Mr. Hancock, Patuxent began the process of revoking his parole based on events that occurred long before the grant of parole. The Board of Review revoked Mr. Hancock's parole based on a claim that he had "failed to comply with the instructions and directives of his therapist [and] he has thwarted the purpose and mission of the [Patuxent] Institution." This case thus presents the following question:

Can Maryland lawfully revoke Mr. Hancock's parole without prior notice to him prohibiting the conduct which was the basis for the alleged violation?

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No. 92-1933

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

PATUXENT INSTITUTION BOARD OF REVIEW,

Petitioner

v.

CLARENCE J. HANCOCK,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Clarence J. Hancock, by his attorneys and pursuant to Supreme Court Rule 15, respectfully requests that this Court deny the Petition for Writ of Certiorari which seeks to review the judgment of the Court of Appeals of Maryland. The opinion below, Patuxent v. Hancock, is reported at 329 Md. 556, 620 A.2d 917.

STATEMENT OF THE CASE

Clarence J. Hancock was convicted of murder and other offenses by the Circuit Court for Prince George's County, Maryland. He was sentenced in 1976 to a term of life imprisonment followed by a consecutive determinate term of years. Id. at 562, 620 A.2d at 920. There is no dispute that he has been a model prisoner. Since

his incarceration he has neither broken any law nor been charged with violating any prison disciplinary rule. Id. at 589, 620 A.2d at 933. He was admitted to the Patuxent Institution in 1977 and his progress in rehabilitation resulted in work-release status, school-release, and both accompanied and unaccompanied leaves. Id. at 562-63, 620 A.2d at 920. He attended college, worked as a copy machine repairer, and remarried. Petitioner here, the Patuxent Institution Board of Review, voted to recommend Mr. Hancock for parole in 1987, but the Governor of Maryland denied the request. Id., 620 A.2d at 920-21.

On July 24, 1990, the Circuit Court for Baltimore City, Maryland, granted Mr. Hancock's petition for a writ of habeas corpus and ordered his release on parole, Petition for Writ of Certiorari, Appendix ("App.") at 129a-134a, unless "[Mr. Hancock] has committed a new offense or if he has violated a major disciplinary rule of the [Patuxent] Institution." Id. at 132a. The basis for the Circuit Court's decision was the opinion of the Court of Appeals of Maryland in Gluckstern v. Sutton, 319 Md. 634, 574 A.2d 898, cert. denied sub nom. Henneberry v. Sutton, 498 U.S. 950 (1990).

No appeal was taken from the Circuit Court for Baltimore City's ruling. Rather, the Board of Review paroled Mr. Hancock. As soon as Mr. Hancock had signed the Order of Parole, App. at 122a-124a, Patuxent Institution served him with a parole revocation warrant and notice of a preliminary hearing. Patuxent immediately found probable cause to believe that Mr. Hancock had violated the

terms and conditions of parole. 329 Md. at 567, 620 A.2d at 922. Patuxent kept Mr. Hancock in prison pending a formal parole revocation hearing. The Board officially revoked Mr. Hancock's parole, stating as its rationale "that Mr. Hancock has failed to comply with the instructions and directives of his therapist [and] he has thwarted the purpose and mission of the [Patuxent] Institution." App. at 120a. The terms and conditions listed in Mr. Hancock's parole order, id. at 123a-128a, did not require Mr. Hancock to attend therapy.

Mr. Hancock appealed the parole revocation decision to the Circuit Court for Howard County, Maryland, which affirmed the Board of Review. Id. at 113a-115a. The Court of Special Appeals of Maryland, however, reversed the Circuit Court for Howard County. Id. at 97a. The Court of Appeals of Maryland granted certiorari and affirmed the decision of the intermediate appellate court with some modification. The Court of Appeals found that due process had been denied Mr. Hancock by revoking parole based on noncriminal behavior without first putting Mr. Hancock on notice that such behavior would in fact be a parole violation. 329 Md. at 582, 620 A.2d at 930. The Court of Appeals stated: "So far as this record reveals, the respondent was first notified of the conditions of his parole at the same time that he was informed that he violated one of them." Id. at 589, 620 A.2d at 933. The Court of Appeals also found, based on state law, that the Board of Review was estopped from asserting that Mr. Hancock was now ineligible for parole by its failure to appeal the decision of the Circuit Court for

Baltimore City. Id. at 587-88, 591, 620 A.2d at 932-33, 934-35. While three judges dissented, they did so on state law grounds. Id. at 592-99, 620 A.2d at 935-38.

Chief Justice Rehnquist, sitting as Circuit Judge for the United States Court of Appeals for the Fourth Circuit, denied the Board's application for a stay of the mandate of the Court of Appeals of Maryland. App. at 1a.

REASONS WHY THE PETITION SHOULD BE DENIED

1. **Neither the decision below nor the record raises the first question presented in the Petition as Mr. Hancock was paroled, not merely promised parole in the future.**

The first question presented by Patuxent raises an alleged conflict between the decision below and Jago v. Van Curen, 454 U.S. 14 (1981). The question presumes, however, that Mr. Hancock was never accorded the rights and privileges of a parolee because he was not immediately released from prison. The Court of Appeals of Maryland has found the facts to be otherwise. Mr. Hancock's parole was effective August 8, 1990. 329 Md. at 565, 586, 620 A.2d at 921, 932. Indeed, Petitioner has previously admitted that it paroled Mr. Hancock. Id. at 591, 620 A.2d at 934. The United States Supreme Court does not exercise jurisdiction simply to review state court findings of fact. See Grayson v. Harris, 267 U.S. 352, 358 (1925). See also Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508, 509 (1924); Houston Oil Co. v. Goodrich, 245 U.S. 440, 441 (1918). Since it is conceded by the Board of Review and confirmed by the Court of Appeals that Mr. Hancock was paroled pursuant to Md. Ann. Code, Art. 31B, on August

8, 1990, Jago is inapposite and Morrissey v. Brewer, 408 U.S. 471 (1972), governs the process due Mr. Hancock.

In Jago, the prisoner was notified by the Ohio Adult Parole Authority that he would be granted parole "on or after" a future date. 454 U.S. at 14. Prior to release, the Authority determined that the prisoner had lied on his parole application. Id. at 15. The question before this Court was whether the Authority's decision to rescind its previous promise to grant parole required the due process protections of a parole revocation proceeding. Under Ohio law, the Authority's right to rescind a parole order before its effective date was well settled. Id. at 22-23 (Blackmun, J., concurring in the result). This Court found that due process protections do not extend to "mutually explicit understandings" between prisoners and prison officials. Id. at 18-19.

The contrast between Jago and the decision below cannot be more clear. The Board of Review did not grant parole effective at a later date but instead paroled Mr. Hancock effective August 8, 1990, the day he received and signed the Order of Parole. Under Maryland law, parole is effected once the parolee signs the Order of Parole acknowledging the terms and conditions of release. 329 Md. at 575, 620 A.2d at 926. See also Murray v. Swenson, 196 Md. 222, 229, 76 A.2d 150, 153 (1950) (prisoner may accept or reject conditions of parole). Unlike in Jago, Mr. Hancock committed no fraud to obtain parole. 329 Md. at 581, 620 A.2d at 929. Under the Patuxent statute, Md. Ann. Code, Art. 31B (1957, 1990 Repl. Vol.), Mr. Hancock's Order of Parole created a protected liberty

interest in retaining parole which could not be abrogated by Patuxent without due process of law. What occurred below under Maryland law was a parole revocation hearing, plain and simple. It was a parole revocation hearing without the constitutionally required notice to the parolee of the terms and conditions of parole. The Board's actions following the grant of parole on August 8, 1990, were not the administrative rescission of a decision to recommend parole at a future date as in Jago, but rather a violation of Mr. Hancock's right to be apprised of the conditions of his existing parole so that he could maintain his liberty.

Nor is the decision below in conflict with the other opinions cited by Petitioner.

The Board's citation of Bryant v. State, 848 F.2d 492 (4th Cir. 1988), for the contention that the Patuxent Institution statute creates no protected liberty interest in retaining parole status, Petition for Writ of Certiorari at 24, is disingenuous. It was the predecessor of the Maryland Parole Commission statute, Md. Ann. Code, Art. 41, §4-501 et seq. (1957, 1990 Repl. Vol. & 1992 Cum. Supp.), not the Patuxent Institution statute, Art. 31B, that was the subject of interpretation by the United States Court of Appeals for the Fourth Circuit. This is evidenced by the opinion of the United States District Court for the District of Maryland, a copy of which is appended hereto. That decision, the subject of the appeal in Bryant, clearly involves the Parole Commission statute, not the Patuxent Institution statute. See Apx. at 7-8.

The Board of Review is well aware that the Maryland Parole Commission is separate and distinct from the Patuxent Institution Board of Review under Maryland law. Mr. Hancock's parole was granted pursuant to Art. 31B, §11, not Art. 41, §4-506. The paroling authorities are completely independent of each other. Furthermore, Bryant concerns the expectancy of parole, not an actual parole and the constitutional protections surrounding parole revocation required by Morrissey, supra.

Petitioner fares no better with the other authorities cited in support of its allegation of a conflict between the decision below and the decisions of other courts, as those opinions do not address the claims of a parolee such as Mr. Hancock, who is entitled to the protections required by Morrissey, supra.

In Ingrassia v. Purkett, 985 F.2d 987 (8th Cir. 1993), the prisoner's wife was allegedly advised by the chairperson of the Missouri Board of Pardon and Parole that the Board "intended to parole Ingrassia in May of 1983, upon his continued good conduct and participation in . . . training." Id. at 988. The Eighth Circuit found that neither these statements nor the prisoner's participation in training ripened the mere expectancy of parole into a constitutionally protected liberty interest. Id.

In Inmates of Orient Correctional Institute v. Ohio State Adult Parole Authority, 929 F.2d 233 (6th Cir. 1991), prisoners who received "on or after" parole dates subject to the approval of an acceptable out-of-prison placement plan, id. at 234, challenged the rescission of their "on or after" dates after placement became

difficult. Relying on Jago, supra, the Sixth Circuit found that Ohio law created no protected liberty interest in the expectancy of parole.

In Winters v. Solem, 444 N.W.2d 722 (S.D. 1989), the unexecuted grant of parole was expressly made conditional on a subsequent event. In Johnson v. Pennsylvania Board of Probation and Parole, 110 Pa. Commw. 42, 532 A.2d 50 (1987), the prisoner never attained the status of a parolee under Pennsylvania law.

To summarize, because Mr. Hancock was paroled pursuant to Maryland law, the decision below is not in conflict with the decisions of this Court, the federal courts of appeal, or decisions of other state courts, and the first question presented in the Petition is not properly before the Court.

2. **The second question presented in the Petition does not warrant review by this Court because it is beyond dispute that a parolee is entitled to notice of the conditions of parole prior to revocation for allegedly violating a parole condition.**

Conceding, as it must, that Mr. Hancock had a protected liberty interest in retaining his parole status created by Maryland law, the Board of Review claims authority to revoke parole without informing the parolee of what he or she must do to comply with the terms and conditions of parole. Petition for Writ of Certiorari at 25-32. Petitioner asserts that this Court has never decided this issue. Id. at 25, 27. But see Douglas v. Buder, 412 U.S. 430, 432 (1973) (per curiam) (due process requires that probationer receive fair warning that certain types of conduct may lead to revocation) (relying upon Bouie v. City of Columbia, 378 U.S. 347 (1964)).

The holding of the Court of Appeals of Maryland is consistent with precedent and unexceptionable:

> Because the conduct on the basis of which the revocation was premised was not criminal -- the petitioner has conceded that the respondent has not violated any state or federal law or municipal ordinance -- and did not constitute an institutional infraction, i.e., it was not the institutional equivalent of criminal conduct, we hold that the respondent's parole was improperly revoked, he not having been notified, in advance, of the condition allegedly violated. Both common sense and due process demands this result.

329 Md. at 589, 620 A.2d at 933.

The Court of Appeals found the following facts in support of its holding:

> [T]he respondent's parole agreement did not contain any condition that he attend therapy, nor was the respondent made aware that his progress or, more accurately, Dr. Farrell's perception of his progress, in therapy was an actual condition of parole which, if violated, would result in loss of liberty.

Id. at 589-90, 620 A.2d at 933-34.

As stated in Morrissey v. Brewer, 408 U.S. 471, 482 (1972), "[t]he parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions." This Court's statement clearly means that the parolee is entitled to know the parole conditions prior to any attempt at

revocation for noncriminal conduct, which is all the decision below holds.

The Board of Review asserts that this Court should grant certiorari to determine whether "the Constitution is so rigid that in order to revoke the parole of an individual who currently presents a risk to society, prison officials must have anticipated and imposed specific parole conditions for all conduct that manifests this dangerousness." Petition for Writ of Certiorari at 31-32. Again, the factual premise upon which Petitioner attempts to construct this purported dilemma is lacking in the record. No fact-finder, neither the Board of Review nor the Maryland courts, has ever found that Mr. Hancock was a "danger" or "risk" to society. See, e.g., App. at 116a-121a (no finding by Board of danger to society). There is no objective and concrete evidence of conduct on the part of Mr. Hancock since the beginning of his incarceration that could possibly be construed as either a parole violation or as manifesting a menace to himself or others. Mr. Hancock received accompanied leaves to the community in 1984. 329 Md. at 562, 620 A.2d at 920. In 1985, he progressed to work-release and school-release status. Id. at 562-63, 620 A.2d at 920. In 1986, Mr. Hancock received permission to leave the prison without being accompanied by prison authorities. Id. at 563, 620 A.2d at 920. In its letter to the Governor of Maryland of February 5, 1988, recommending Mr. Hancock for parole, Patuxent stated that Mr. Hancock was not a danger to society. Mr. Hancock is in fact now working and contributing to his community. Without evidence of

a parole violation or any fact-finding of dangerousness, Patuxent's attempt at parole revocation cannot stand. See Douglas v. Buder, supra, 412 U.S. at 432 (finding of probation violation so devoid of evidentiary support as to be invalid under Due Process Clause); Arciniega v. Freeman, 404 U.S. 4 (1971) (per curiam) (no satisfactory evidence of parole violation in record).

"As a matter of both constitutional law and common sense, probationers and parolees can reasonably be expected to follow only those probation conditions of which they are aware." Cohen, Neil P. & Gobert, James J., The Law of Probation and Parole, §5.04, at 193 (1983 & 1992 Cum. Supp.) (citing United States v. Dane, 570 F.2d 840 (9th Cir. 1977), cert. denied, 436 U.S. 959 (1978)). Patuxent's reliance upon this treatise to support its contention that lower courts need guidance in the area of the law encompassed by the second question presented, Petition for Writ of Certiorari at 27, is misleading. The authors of the treatise, at the section cited in the Petition, are discussing ambiguous or vague conditions of parole or probation, not the constitutionally required notice of those conditions which must be given to the parolee or probationer. While the Court of Special Appeals of Maryland, in an alternative holding, found the condition allegedly violated by Mr. Hancock "vague, uncertain, and indefinite," App. at 109a, the Court of Appeals of Maryland expressly declined to reach this issue because it held that no notice of the condition was given to Mr. Hancock. See 329 Md. at 590 n.18, 620 A.2d at 934. Because the Court of Appeals of Maryland expressly declined to pass upon the vagueness

of the parole condition allegedly violated, that issue is not now before the Court. If the question was not passed upon below, certiorari should not be granted on the issue. See United States v. Williams, ____ U.S. ____, ____, 112 S. Ct. 1735, 1738 (1992). Contrary to the Board's assertion, the lower courts are in no need of guidance on the issue of whether a parolee should be informed in advance of what he or she must do to stay on parole.

Nor is there any conflict between the decision below and those of other courts on the issue raised by the second question in the Petition. Patuxent cites Benboe v. State, 738 P.2d 356 (Alaska App. 1987), and State v. Mace, 154 Vt. 430, 578 A.2d 104 (1990), as conflicting authorities on this point. Petition for Writ of Certiorari at 28. These decisions, however, neither conflict with each other nor with the decision below. In Mace, the defendant's probation agreement, which the defendant signed prior to the occurrence of the conduct giving rise to the citation for probation violation, explicitly required that he "attend, participate, and complete" a specified therapeutic regimen. 154 Vt. at 432, 578 A.2d at 105. The terms and conditions of Mr. Hancock's parole, App. at 123a-128a, contain no requirement that he attend therapy. In Mace, the basis for the violation occurred after the defendant had been apprised of the condition allegedly violated. 154 Vt. at 432, 578 A.2d at 105. In the instant case, the facts as found by the Maryland courts are otherwise. Mr. Hancock was not "notified, in advance, of the condition allegedly violated." 329 Md. at 589, 620 A.2d at 933. In Benboe, the condition allegedly violated was

found not to be an actual condition of probation. 738 P.2d at 360. In the alternative, the court found that the defendant had not violated the condition. Id. at 362. In short, Benboe is not in conflict with Mace, and Mace is not in conflict with the decision below.

The Board of Review asserts that "[t]he facts surrounding respondent's incarceration and parole in this case demonstrate that he was on fair notice that his failure to fully participate in therapy could lead to the revocation of his parole." Petition for Writ of Certiorari at 28-29. The Maryland courts, however, have found the facts to be otherwise. See 329 Md. at 589, 620 A.2d at 933 ("So far as this record reveals, the respondent was first notified of the conditions of his parole at the same time he was informed that he violated one of them."). This Court does not grant certiorari "to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925).

"It is an essential component of due process that individuals be given fair warning of those acts that may lead to a loss of liberty." United States v. Dane, 570 F.2d 840, 843 (9th Cir. 1977), cert. denied, 436 U.S. 959 (1978) (citing Bouie v. City of Columbia, 378 U.S. 347 (1964); Connally v. General Construction Co., 269 U.S. 385 (1926)). "[W]here the proscribed acts are not criminal, due process mandates that the petitioner cannot be subjected to a forfeiture of his liberty for those acts unless he is given prior fair warning." Dane, 570 F.2d at 844. That is the holding of the Court of Appeals of Maryland. This holding is

unremarkable. It is based primarily on a construction of Maryland law and arises out of a singular set of circumstances whereby the Board of Review paroled Mr. Hancock pursuant to an order of the Circuit Court for Baltimore City rather than appealing that court's decision. The Board is now attempting to "excuse its own omission," 329 Md. at 585, 620 A.2d at 931, to follow Maryland's rules of appellate practice.

Maryland has long followed this principle:

> A parolee is not expected or required at once to achieve perfection. If his conduct is that of the ordinary well-behaved person, with no more lapses than all people have, with no serious offenses charged against him, and with no indication that he intends in the future to pursue the course which led to his original conviction, the courts and probation officers should not seek for unusual and irrelevant grounds upon which to deprive him of his freedom.

Swan v. State, 200 Md. 420, 430, 90 A.2d 690, 695 (1952). When the Patuxent Institution Board of Review departed from this principle, its actions were reversed by the Maryland courts.

The holding of the Court of Appeals of Maryland is plainly correct. "All are entitled to be informed of what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). "[W]hen notice is a person's due, process which is a mere gesture is not due process." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).

As the factual scenario that gave rise to the decision below is highly unlikely to recur in Maryland or elsewhere, and as there

is no conflict with decisions of the federal courts or state courts of last resort, there is no need for the exercise of this Court's discretionary jurisdiction. See Forsyth v. City of Hammond, 166 U.S. 506, 514-15 (1897).

CONCLUSION

For these reasons, Respondent prays that this Court deny the Petition for Writ of Certiorari and grant to the Respondent such other and further relief as the nature of his cause may require.

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APPENDIX

A copy of the opinion of the United States District Court for the District of Maryland in Bryant v. State of Maryland, Civil No. M-86-2568 (Oct. 3, 1986) (unreported), is appended to the Respondent's Brief in Opposition to demonstrate that the Petitioner's reliance upon Bryant v. State, 848 F.2d 492 (4th Cir. 1988), to argue that a conflict exists between the decision below and a decision of the United States Court of Appeals for the Fourth Circuit, Petition for Writ of Certiorari at 24, is misleading. Both the District Court and the Fourth Circuit construed the Maryland Parole Commission statute, not the Patuxent Institution statute. Respondent was paroled pursuant to the Patuxent Institution statute, Md. Ann. Code, Art. 31B (1957, 1990 Repl. Vol.).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BILLIE AUSTIN BRYANT	:	
v.	:	CIVIL ACTION NO. M-86-2568
STATE OF MARYLAND	:	

MEMORANDUM AND ORDER

Billie Austin Bryant, petitioner, acting pro se, seeks federal habeas corpus relief in relation to his imprisonment as a result of his conviction of bank robbery in the Circuit Court for Prince George's County on April 14, 1969 for which he received a 20-year sentence. Petitioner asserts four grounds for review: 1) the indictment upon which he was convicted was amended the day of trial; 2) he was denied an appeal from an unfavorable decision in a post-conviction proceeding and was denied a request for an attorney to perfect such appeal; 3) he was denied counsel and an evidentiary hearing in a second post-conviction proceeding after which he was denied an appeal or counsel to perfect such appeal; and 4) he was denied a parole hearing on his Maryland sentence.

It appearing that the petitioner has exhausted his state remedies, the court will examine whether petitioner's claims merit issuing service.

ENTERED
OCT 3 1986

I. The Amended Indictment

Petitioner alleges that his due process rights under the Fifth and Fourteenth Amendments were violated when the prosecutor was allowed to amend the indictment on the day of trial to change the name of the person robbed in the bank from Jack Hay, the manager, to Betty Mosely, the clerk, and to change the dollar amount involved from $3,500 to $1,000 (Transcript of Proceedings, Attached to Complaint, at 3-6).

The sufficiency of an indictment is generally not subject to challenge in habeas corpus proceedings unless a defect in the indictment would strip the trial court of jurisdiction. Woolsey v. Best, 299 U.S. 1 (1936). An indictment misleading the defendant as to the charge, however, might be grounds for habeas corpus relief. Snead v. Smyth, 273 F.2d 838, 840-41 (4th Cir. 1959); see also Hayes v. Peyton, 364 F.2d 303 (4th Cir.), cert. denied, 385 U.S. 981 (1966). An indictment is sufficient if it contains elements of the offense charged, fairly informs the defendant of the charge against which he must defend, and enables him to plead judgment as a bar to future prosecutions for the same offense. Hamling v. United States, 418 U.S. 87, 117-18 (1974); United States v. Previti, 644 F.2d 318 (4th Cir. 1981). The Fourth Circuit has likewise held that a superseding indictment on the eve of trial did not deprive the defendant of a fair trial where defendant was given

fair notice of the charge. United States v. Diamond, 561 F.2d 557 (4th Cir. 1977).

In the transcript submitted by petitioner, it appears that his attorney admitted that he had been told a month before trial that Betty Mosely was the person robbed. If there was any error in allowing the amendment, which the court believes there was not, it was not of the type which would strip the trial court of its jurisdiction to hear the case nor of sufficient gravity to deny due process to the petitioner.

Ground I of the Petition will be dismissed.

II. Right to Counsel for Appeal of a Post-Conviction Hearing

Petitioner alleges that he was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments when he was not appointed an attorney to perfect appeals to the Court of Special Appeals after two post-conviction hearings.

Based upon due process and equal protection rights, convicted indigents are entitled to be represented by counsel on their first appeal. Ross v. Moffitt, 417 U.S. 600, 611 (1974); Douglas v. California, 372 U.S. 353, 357 (1963).

This right does not extend to the process of seeking additional, discretionary appeals. Ross, 417 U.S. at 615. Once, through the assistance of counsel, a record is established on the appeal as of right, sufficient record is available

for the higher court to review and consider whether or not to hear the discretionary appeal. Id.

Md. Ann. Code art. 27, § 645A states, in pertinent part:

> "(a) Right to institute proceeding to set aside or correct sentence. - Any person convicted of a crime and either incarcerated under sentence of death or imprisonment or on parole or probation, including any person confined or on parole or probation as a result of a proceeding before the District Court who claims that the sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of this State, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to collateral attack upon any ground of alleged error which would otherwise be available under a writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy, may institute a proceeding under this subtitle in the circuit court for the county or the Criminal Court of Baltimore to set aside or correct the sentence, provided the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the conviction, or in any other proceeding that the petitioner has taken to secure relief from his conviction.

The statute establishes a right to appeal certain issues not waived or previously and finally litigated to the circuit court in the appropriate jurisdiction. Assuming, arguendo, that the issues involved in petitioner's two post-conviction hearings were not previously and finally litigated, the proceedings in the circuit court would constitute petitioner's "first appeal of right." Under Ross v. Moffitt, petitioner is not entitled to assistance of an attorney to perfect a discretionary appeal therefrom. 417 U.S. 615.

Ground II of the petition will be dismissed.

III. Right to an Evidentiary Hearing at the Post-Conviction Proceedings

Petitioner claims that he was not appointed counsel at his second post-conviction proceeding. The record submitted, however, indicates otherwise. The Opinion and Order of Court labeled Group Exhibit "B" states: "The State's Attorney withdrew his motion, and counsel then proceeded to argue the merits of the petition." (Group Exhibit B at 1). Also, copies were sent by the court to the Office of the Public Defender. (Id. at 4).

An evidentiary hearing is required on a first petition under Maryland's Uniform Post Conviction Procedure Act, but not on a subsequent petition. Rule 4-406(a), Md. Rules of Procedure. The issue decided in petitioner's second post-conviction proceeding was "does the setting aside of a sentence which a consecutive sentence is to succeed have the effect of causing the consecutive sentence to run from the date of its imposition?" (Group Exhibit B at 2). There was no need to present factual evidence. Moreover, the Opinion reflects that there was a hearing, during which counsel argued the merits of the petition. Petitioner could have put on any evidence at that time.

Ground III of the petition will be dismissed.

IV. Parole Letter

Petitioner claims he was denied due process and equal

protection by the failure of the Attorney General to respond to his letter requesting a parole hearing.

Petitioner did not raise this issue in either a post-conviction proceeding or in a complaint to the Inmate Grievance Commission. However, claims not directly or indirectly challenging the validity of the conviction are not cognizable under Maryland post-conviction proceedings. Knox v. Director, Patuxent Institution, 1 Md. App. 678, 680 (1967). Claims such as petitioner's would be governed by the Inmate Grievance Commission, except that petitioner is not a "person confined to an institution within the Division of Correction, or otherwise in the custody of the Commission of Correction, or confined to the Patuxent Institution." Md. Ann. Code art. 41, § 204F(d). It would seem, therefore, that petitioner has no state remedy to exhaust.

Mere existence of a parole system does not give an inmate sufficient parole expectation to require the state to accord him a level of due process protection similar to that for parole revocation proceedings. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 8-10 (1979); Wetzel v. Edwards, 635 F.2d 283 (4th Cir. 1980). The extent, if any, of a prisoner's legitimate expectation of parole depends on the structure of the state statute. Greenholtz, 442 U.S. at 11-12. In Greenholtz, the Supreme Court accepted the argument that a Nebraska statute, which provided that the parole board "shall" order the prisoner's

release unless certain conditions are established, provided some expectation of parole release. Id. at 12. The Maryland statute has no such provision. The matters to be considered at a parole hearing in Maryland are as follows:

> "Each hearing examiner and Commission member determining if an inmate is suitable for release on parole shall consider:
> (1) The circumstances surrounding the crime;
> (2) The physical, mental, and moral qualification of the inmate eligible for parole;
> (3) The progress of the inmate during his confinement;
> (4) Whether or not there is reasonable probability that the inmate, if released on parole, will remain at liberty without violating the law; and
> (5) Whether or not release on parole of the inmate is compatible with the welfare of society."

Md. Ann. Code art. 41, § 112 (1976).

Section 112 does not contain language comparable to the mandatory language of the Nebraska statute sufficient to give an inmate a legitimate expectation of release. Therefore, petitioner has no right to be afforded due process protection.

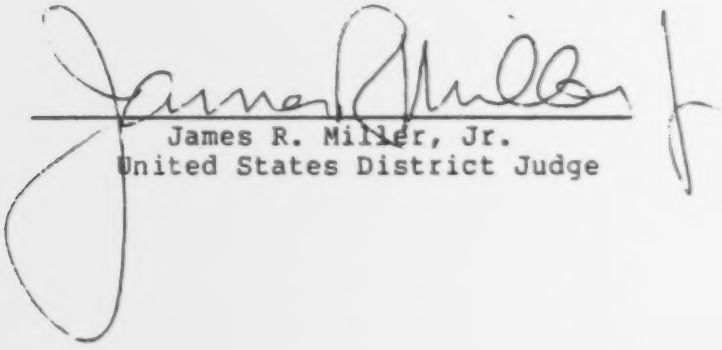
Petitioner has stated no facts in Ground IV to support any equal protection argument either. Ground IV, therefore, will be dismissed.

Accordingly, it is this 3rd day of October, 1986, by the United States District Court for the District of Maryland, ORDERED:

1) That leave to proceed in forma pauperis is hereby GRANTED.

2) That petitioner's complaint is hereby DISMISSED, pursuant to 28 U.S.C. § 1915(d), as frivolous.

3) That the Clerk mail a copy of this Memorandum and Order to the petitioner, Billie Austin Bryant, #93746-131, P. O. Box 1000, Marion, Illinois 62959, and to the United States Attorney for the District of Maryland.



James R. Miller, Jr.
United States District Judge

Certificate of Service

I HEREBY CERTIFY that on this 6th day of August, 1993, three copies of the foregoing Respondent's Brief in Opposition were mailed, postage prepaid, to Andrew H. Baida and Carmen M. Shepard, Assistant Attorneys General and counsel for Petitioner, 200 St. Paul Place, 20th Floor, Baltimore, Maryland, 21202.

Stuart R. Cohen

Stuart R. Cohen

dm/8779

(2)

SUPREME COURT, U.S.
FILED
AUG 17 1993
OFFICE OF THE CLERK

No. 92-1933

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PATUXENT INSTITUTION BOARD OF REVIEW,
Petitioner,

v.

CLARENCE J. HANCOCK,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

REPLY TO BRIEF IN OPPOSITION

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No. 92-1933

October Term, 1992

IN THE
SUPREME COURT OF THE UNITED STATES

PATUXENT INSTITUTION BOARD OF REVIEW,

Petitioner,

v.

CLARENCE J. HANCOCK,

Respondent.

On Petition for Writ of Certiorari to the
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REPLY TO BRIEF IN OPPOSITION

REPLY ARGUMENT

I. THIS CASE PRESENTS THE SUBSTANTIAL QUESTION OF WHETHER A LIBERTY INTEREST IN PAROLE RELEASE CAN EVER BE CREATED SOLELY BY THE ACTS OF STATE OFFICIALS.

Respondent's Brief in Opposition ("Br.") confirms that the decision of the Court of Appeals of Maryland is

in conflict with Jago v. Van Curen, 454 U.S. 14 (1981), because respondent does not dispute that the actions of State officials form the sole basis of the lower court's holding that respondent has a constitutionally-protected liberty interest in parole. The State's actions in this case are indistinguishable from the conduct that this Court in Jago held did not give rise to a liberty interest. Review is warranted to decide whether conduct alone can ever establish such a constitutional right and whether this Court's per curiam decision in Jago requires reversing the Court of Appeals' holding that the State's actions here "created . . . a liberty interest in parole release." (App. at 58a.)

In asserting that "[u]nder the Patuxent statute, Mr. Hancock's Order of Parole created a protected liberty interest in retaining parole," Br. at 5-6 (citation omitted), respondent begs the first issue that petitioner asks this Court to review because the Court of Appeals

engaged in no analysis of that statute. Despite this Court's repeated emphasis that pertinent State law must be scrutinized in determining whether a prisoner has a liberty interest entitled to due process protection, see Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454 (1989); Board of Pardons v. Allen, 482 U.S. 369 (1987); Olim v. Wakinekona, 461 U.S. 238 (1983); Hewitt v. Helms, 459 U.S. 460 (1983); Jago v. Van Curen, 454 U.S. 14; Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1981); Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979); Wolff v. McDonnell, 418 U.S. 539 (1974), the Court of Appeals conducted no analysis of "the language of the relevant statutes and regulations." Kentucky Dept. of Corrections v. Thompson, 490 U.S. at 461.

The lower court instead confined its constitutional inquiry to the actions of State officials in granting

respondent parole. Jago and the decisions of other courts make clear that those actions, by themselves, do not create a liberty interest. See Bryant v. State, 848 F.2d 492 (4th Cir. 1988); Ingrassia v. Purkett, 985 F.2d 987, 988 (8th Cir. 1993); Inmates of Orient Correctional Institute v. Ohio State Adult Parole Authority, 929 F.2d 233, 235-238 (6th Cir. 1991); Winters v. Solem, 444 N.W.2d 722 (S.D. 1989). See also Johnson v. Pennsylvania Board of Probation and Parole, 532 A.2d 50, 52 (Pa.Cmwlth. 1987).

Neither that State conduct, nor the Court of Appeals' determination that petitioner was estopped from asserting respondent was ineligible for parole, provides any basis for the court's holding that respondent had a constitutional entitlement in parole release. See Connecticut Board of Pardons v. Dumschat, 452 U.S. at 465. See also Biser v. Town of Bel Air, 991 F.2d 100, 104 (4th Cir. 1993) ("A subsequent order by a court of

equity estopping a municipality from relying on its legal right does not represent a legitimate claim of entitlement.").

Respondent asserts that Jago is factually distinguishable from this case and that Morrissey v. Brewer, 408 U.S. 471 (1972), "governs the process due Mr. Hancock." Br. at 5. But Morrissey addressed a parolee's interest "in his continued liberty" and involved the very different scenario where "[t]he parolee ha[d] been released from prison. . . ." 408 U.S. at 482 (emphases added). Respondent does not dispute that simultaneously with being served with an Order of Parole, the Patuxent Institution Board of Review served him with a parole revocation warrant (App. 14a-15a), with the result that, as one of the courts below explicitly found, he was "never on parole" because his parole was "revoked before he was released. . . ." (App. at 108a, 111a.) See also (App. at 131a) (circuit court opinion)

(stating that respondent "has not been on parole physically").

Moreover, the Court of Appeals found no need to even rely on Morrissey, finding instead that the State's decision to parole respondent "may not, without complying with due process, be rescinded based on new information discovered before physical release has actually occurred." (App. at 61a) (emphasis added). Thus, the court found that respondent had a liberty interest in parole not because he physically had been released from incarceration as was the parolee in Morrissey, but solely because the State provided him with an Order of Parole. This Court should review this case and decide whether such a constitutional right can arise out of that State conduct.

II. THIS CASE PRESENTS THE SIGNIFICANT ISSUE OF FIRST IMPRESSION OF WHAT NOTICE IS REQUIRED WHEN REVOKING THE PAROLE OF A PRISONER IN A MENTAL HEALTH FACILITY.

Review is also warranted because the constitutional standard that the Court of Appeals applied seriously impairs the State's authority to revoke the parole of an inmate who no longer responds favorably to mental health treatment and who is deemed to pose a threat to the safety of the community. The Court of Appeals held the State may not constitutionally revoke the parole of such an inmate in the absence of criminal behavior or "the institutional equivalent of criminal conduct" (App. at 68a-69a), unless the inmate is explicitly notified in advance of the precise circumstances that could lead to the loss of liberty. This issue has not been addressed by this Court either in Morrissey or any other case, and yet is one that affects the use of parole as a therapeutic

technique by all governmental institutions that treat mentally ill inmates.

Respondent concedes that the notice component of the due process clause requires only that "individuals be given fair warning of those acts that may lead to a loss of liberty." Br. at 13 (citation omitted). Respondent received at least as much notice as that which is constitutionally due in an involuntary civil commitment proceeding, where an individual may lose his or her liberty indefinitely as long as that person is mentally ill and poses a danger to himself and others. See Addington v. Texas, 441 U.S. 418 (1979). Indeed, the governing statute explicitly warned respondent that early parole required that he remain an "eligible person" who is "likely to respond favorably to the programs and services provided at Patuxent" and whose release "will not impose an unreasonable risk on society." Md. Ann. Code Art. 31B, §§ 11(b)(2), 1(g) (1957, 1990 Repl.

Vol.).

Furthermore, the statute governing his tenure at Patuxent was not the only source of fair warning; in its decision revoking his parole, Patuxent noted that it issued "numerous directives regarding his conduct," cautioned him a number of times regarding the need to satisfactorily participate in treatment, and provided him with "[t]reatment plans detailing specific areas of concern." (App. at 118a.) This Court should resolve the question of whether due process requires more of the State in order to revoke the parole of a mentally ill inmate.